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**HISTORICAL JURISPRUDENCE**

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# HISTORICAL JURISPRUDENCE

AN INTRODUCTION TO THE SYSTEMATIC  
STUDY OF THE DEVELOPMENT  
OF LAW

BY

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MEMBER OF THE BARS OF PENNSYLVANIA, NORTH CAROLINA,  
ETC., ETC.

New York

THE MACMILLAN COMPANY

LONDON: MACMILLAN & CO., LTD.

1922

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JF423  
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Set up and electrotyped. Published June, 1900. Reprinted  
November, 1917.

Norwood Press  
J. S. Cushing Co. — Berwick & Smith Co.  
Norwood, Mass., U.S.A.



**I Dedicate this Volume**

**BY PERMISSION TO**

**SIR FREDERICK POLLOCK, BART., M.A., LL.D.**

**CORPUS PROFESSOR OF JURISPRUDENCE IN THE  
UNIVERSITY OF OXFORD**

**AND TO**

**FREDERICK WILLIAM MAITLAND, LL.D.**

**DOWNING PROFESSOR OF THE LAWS OF ENGLAND  
IN THE UNIVERSITY OF CAMBRIDGE**





## PREFACE

THE study of Historical Jurisprudence possesses a complex attractiveness. It has a value that is at once theoretical and practical, an interest that arises from the ease of acquiring, as well as from the difficulty of comprehending, its principles.

The student finds in jurisprudence a mental training that calls into fullest activity all the forces which years devoted to the study of the humanities have placed at his disposal. Languages, history, philosophy, — all these combined are insufficient to unlock every barrier to the complete knowledge of this most far-reaching science. Yet the man devoid of college education, — without any education, indeed, beyond that sufficient to enable him to pass the usual bar examination, — finds in Historical Jurisprudence matters not only of deepest interest, but of highest value. The lawyer finds therein the solid foundation upon which rests modern law; the vital force of that law, which to him is too often a thing to be merely memorized; and understanding of those principles which are not seldom by him only dimly discerned in enactment and precedent. The student of the liberal arts finds in jurisprudence the record of national development, the key to the great movements which have made and unmade dynasties, the explanation of that which would without it be so obscure as to defy understanding.

The study of jurisprudence is as profitable for him who has but little time to devote to the pursuit of culture as for him whose whole life is devoted to such pursuit. In both cases the results will be as satisfactory as they will

be different. To each student will be given that which he seeks; and to him whose labors have been the least will be given that which to him is as sufficing as is the reward of him who has labored through all of life's day.

Historical Jurisprudence has been developed in the Old World. In university and in study, during a score of centuries, the ablest thinkers have given of their best effort to perfect the science, until it has achieved an importance not excelled by that of theology. In the New World the northern continent has been surpassed by the southern in this science. In South America the study of jurisprudence early found an honored place. In the United States the rush and tumult of material progress has caused the philosophical to recoil before the impact of the ultra-practical. Scientific jurisprudence has been a thing unknown to the majority, not even being considered a necessary background for the comprehension of law.

The inevitable reaction has lately occurred. Among the causes to which it can be ascribed may be placed the influence of the few institutions where devoted teachers have kept fresh the learning of the old law; the desire of scholars to bring home to students the truth that, without a knowledge of the jurisprudence of a nation, its history cannot be comprehended; the conviction among the leaders of juridical thought that the principles so familiar to them should be mastered by every candidate for the Bar; and the appreciation by the general reader of the fact that in jurisprudence is to be found a prolific source of culture.

The influence of this awakening of interest in scientific legal study has stimulated me to publish this volume. It does not purport to contain within its covers the sum of the world's knowledge of legal development. Its purpose will be served if it prove a helpful guide to the follower of the systematic study of law, an aid to the teacher of



jurisprudence who seeks a basis for his expositions, or a means of conveying information to the general reader.

The text is generally based upon original research; but I have not hesitated to avail myself of the results achieved by those great masters of the law, among whom Dahn, Esmein, Jolly, Karlowa, Köhler, Maine, Maitland, Mommsen, Muirhead, Peiser, Pollock, Revillout, Savigny, Sohm, etc., hold honored place. I have noted special obligations in their appropriate positions.

I desire to express my thanks to Joseph Cullen Ayer and John R. Larus for the patience and learning which have lightened many burdens which the passage of this volume through the press has brought to me.

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1900.





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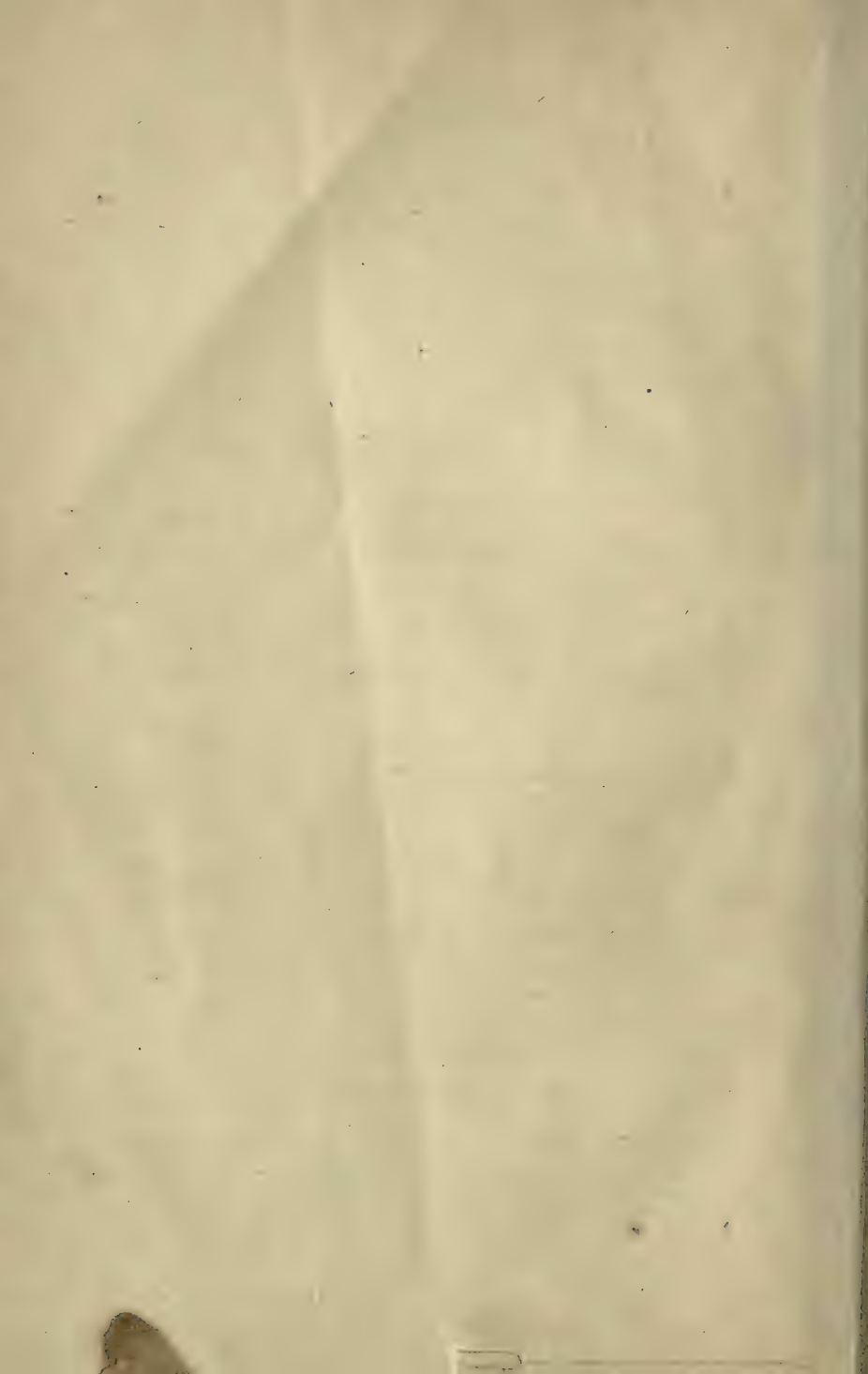
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# HISTORICAL JURISPRUDENCE

## INTRODUCTION

### THE PROVINCE OF HISTORICAL JURISPRUDENCE

[LAW is an outgrowth of the needs of man in society.] In the first form of social grouping, law was no more than the sum of the simple rules by which alone even the rudest types of communal life were made possible. For scores of centuries the science of jurisprudence was non-existent; and yet in no one year of this diuturnity did the fundamental principles of juridical science cease to develop progressively. ]

The growth of nations brought into existence masses of interpenetrating customs, whose fibres, reaching out, found lodgment in the customs of contiguous peoples. ] Of system there was little; of scientific arrangement still less. The customs, and later the laws, appear as if heaped one upon another in inextricable confusion when viewed as a national legal system. Considered from the local point of view, however, they appear as suitable and sufficient for local needs. ]

But the limited application failed before the progress that broke down the barriers of locality. National growth caused an intermingling of men and a consequent confusion of laws. Because of social and economic reasons, this confusion was intolerable. Scientific arrangement and adjustment became imperative. This task was beyond the ability of those to whom a mere knowledge of the letter of many rules was knowledge of the law. Then arose

from necessity, as law had arisen, the science of Jurisprudence.

Jurisprudence should be regarded as more than a mere knowledge of the law. It is a science, which endeavors to ascertain the fundamental principles of which the law is the expression. It rests upon the laws as established facts; but at the same time it is a power in bringing the laws into a coherent system and in rendering all parts thereof subservient to fixed principles of justice.

Although jurisprudence is based upon the laws as given facts, it is essentially a progressive science, inasmuch as the law which it endeavors to comprehend and systematize is progressive and aims with ever-closer approximation to approach the ideals of the race in which it obtains. Jurisprudence is so closely interwoven with the development and history of the world as to claim a place among the historical sciences. At the same time it is so closely connected with—in fact, springing from—a clearly felt ethical need, that it takes a place closely allied to that of ethical science. The connection which law has always held with morality is hardly less intimate than that which exists between its fundamental principles and those of ethics.

The subject-matter of jurisprudence must, however, be carefully distinguished from the precepts of morality. The distinction is fundamental. Laws, in the sense in which they are here regarded, have reference to external action. They cannot control the operations of the mind, except so far as concerns the expression of that mind in word or deed. But morality is concerned almost exclusively with the mind, or with the internal state which precedes action. Morality proposes a certain ideal of character toward which all should strive; law proposes a norm to which all must, at their peril, conform. Morality treats man as an intelligent being, endowed with will and emotions; law regards him merely as capable of having



rights and duties toward his fellows. Morality places before each man a complete code to which he should entirely conform; law insists on those norms according to which he must act if he wishes to exercise certain optional rights.

What, then, is law? It may be considered either as it has become by the evolution of thought, or as it was when it first became differentiated from closely related elements of the primitive human consciousness. The definition of the analytic jurists according to the former method is as follows: According to Austin and Bentham, a law may be resolved into a general command, one emanating from a sovereign or lawgiver and imposing an obligation upon citizens, which obligation is enforced by a sanction or penalty, threatened in the case of disobedience. This definition, never quite true, never quite applicable, is for all that not to be wholly rejected in its political sense. Yet it is too unsatisfactory, too impracticable, to be recognized as a complete definition of even the most modern concrete law, though therein lies its chief claim to authority. And certainly such a definition does not apply to the early law, or that from which modern law has been evolved. In the early forms of society there was, in place of the skillfully defined modern law, a body of custom, not attributable to any sovereign authority or lawgiver. This custom was regarded as binding upon the whole body of persons forming the primitive social group in which such custom obtained. Furthermore, that custom was enforced in a rude manner, either by permitting the person injured by its violation to avenge himself as best he could, or by depriving the offender of certain rights, such as the aid and society of members of the group. In such a state, law would be best defined as that body of customs regarded as binding upon the members of a group or class, and enforced by their authority. This is law as first discerned in all nations; it is the form in which it constantly appears

in the course of history. Only with the rise of the abundant modern legislation has it been seen that law might be conceived as the command of a sovereign body. ]

When law first appears as an enforced custom, it was not clearly defined as apart from other restraints and guides to the conduct of mankind. "Different periods of history may be pointed out in which, one after the other, religion, art, science, law, and social problems have become for the first time so distinctly present to the consciousness of mankind that they seem to have been then first discovered or invented, to the advantage of future ages; but even in the very beginning of civilization there could not have been altogether absent any one of those activities of the human soul, which later became more clearly differentiated one from another, taking separate paths to various ends."<sup>1</sup> Thus, in *Manu* and other Hindu literature, law may be found intermingled with science and religion. Indeed, only with difficulty is law as defined by the jurist distinguished from law as revealed in nature, especially in that semi-theological and anthropomorphic conception of nature and natural law which is still frequently to be found. Morality is too often confounded with law; and the confusion which has resulted has produced some of the most ghastly pages of the history of mankind. Yet morality has ever guided and stimulated law to a higher and juster conception of its task, while law has at the same time rendered the commands of morality more sharply defined and more exacting. Law has also been frequently found confused with religion; in fact, the connection of a body of laws with the national god or gods is a phenomenon to be found in the history of almost every nation of antiquity. Law has rendered the conceptions of religion more awe-inspiring, while religion has given to law a sanctity and majesty which have made possible its growth to power. The

<sup>1</sup> Lotze, *Microcosmus*, Bk. VIII, chap. 1, § 1.

various sciences have not grown without the existence of reciprocal influences ; above all, without constant and intimate connection with the actual life of the people.

Possibly no great department of man's higher thought and activity is so closely connected with his actual life as is the law. Because law is that body of customs which are enforced by the community, it is that which regulates man's conduct toward his fellow-men, which controls his gross passions and restrains his rude impulses. It renders possible common life. To a great degree, it takes its rise in the demands of trade, and it makes that trade practicable. Much of it arises spontaneously in connection with the possession of property, and it renders possession possible. In other words, it arises spontaneously in connection with man's social life, and its distinctiveness from custom lies only in the fact that law is so necessary to the existence of society and the common activity that it is enforced by an authority.

On account of this most intimate connection between the actual life of a nation, with all its demands, and the law by which that life is rendered possible, law has been defined by Rousseau, in *Le Contrat Social*, as "*la volonté générale*";<sup>1</sup> by Kant as "the totality of the conditions under which the will of one may be united with the will of another according to a universal law of freedom";<sup>2</sup> and by Savigny as the rules whereby is defined the visible limit within which the existence of each individual gains sure and free room.<sup>3</sup> All these definitions regard law as the will of the whole, or as the possibility of the life of the whole. The will and the conditions are, however, inseparable. The same will which creates the demand creates also the conditions under which that demand can be satisfied.

<sup>1</sup> Cf. Hegel, *Philosophie des Rechts*, Zusatz, § 2.

<sup>2</sup> *Rechtslehre Werke*, VII, p. 27.

<sup>3</sup> Savigny, *System des heutigen Römischen Rechts*, I, p. 332.



Historical Jurisprudence deals with law as it appears in its various forms and at its several stages of development. It holds fast the thread which binds together the modern and the primitive conceptions of law, and seeks to trace, through all the tangled mazes which separate the two, the line of connection between them. It takes up custom as enforced by the community, and traces its development. It seeks to discover the first emergence of those legal conceptions which have become a part of the world's common store of law, to show the conditions that gave rise to them, to trace their spread and development, and to point out those conditions and influences which modified them in the varying course of their existence. But Historical Jurisprudence is not a mere branch of anthropology or sociology, except in so far as any science which deals with human life may be regarded as a department of those studies. It does not attempt to set forth all laws and customs which may be found in ancient and modern savage tribes, as well as in civilized nations of every clime. If such were its object, it would not be a science, nor would it be possible for it to be complete. It would be a mere collection of laws and customs, having no necessary order or system. Its attainment or lack of perfection would depend merely upon the degree of completeness with which its collection had been made; and the disappearance of innumerable tribes and even races, leaving no record of their laws, would be an ineradicable blemish upon its work.

It is not, therefore, all legal systems that we must treat in detail in our present inquiry. The systems which are selected are either those which have contributed to the great stream of scientific jurisprudence, or those which flow from it. They are grouped around the jurisprudence of Europe and of the countries which owe to it their civilization.

To this great central stream of legal science the ancient monarchies of Babylon and Egypt have largely contrib-

uted. The Phœnicians invented few or no legal principles; but they transmitted those which they received from older civilizations. The Jewish law obtained in legal development a place quite out of proportion to the part played by that nation in ancient politics. Through the religious influence which it has indirectly exerted upon the thought of the whole world, that nation's legal system has been of the greatest efficacy in moulding legal ideas centuries after Israel ceased to exist as a nation. The Hindu law has stood quite apart from the great progress of European jurisprudence; yet it is the most perfect example of Aryan law as free from the influence of Babylon and Egypt. The Brehon law of Ireland most completely preserved the Celtic form of the Aryan law. Its position in the study of Comparative Jurisprudence is assured. It is the greatest example in Western Europe of law which has entirely escaped the influence of the Semitic and Roman law. But the Brehon law, although valuable as an illustration of the essential legal principles common to all branches of the Aryan race, has been completely superseded by the English law. The judges who enforced the laws of the conquerors of Ireland were ignorant that the law which they so vehemently denounced was essentially the same as the early English law, especially in those principles which excited their condemnation. The Brehon law perished before a system of higher scientific spirit and of greater fitness to meet the needs of modern civilization. The Hindu law, on the other hand, is to-day the law of a vast empire, and it is enforced by the English authorities, who have seen the evils resulting from the complete destruction of the ancient Irish system.

It must also be remembered that this system of exclusion applies to the jurisprudence of the smaller European countries. In our present inquiry it is not necessary to examine the laws of Norway, Sweden, or Denmark. Though they are of great value in a comparative study of

law, their modern form has been attained under the influence of the Continental legal science. Their legal institutions are those common to all Aryan races ; but they stand apart from the line of development which we treat in this work.

The various systems which have been founded upon the Roman Law are of far less importance than is that law itself. In touching upon them, it is sufficient merely to indicate their relation to the great basis of Continental law. The minute differences which have arisen among them are not properly cognizable in this work.

In these respects Historical Jurisprudence has much in common with the historical treatment of other sciences or of arts. Yet it differs from these, inasmuch as the subject-matter of jurisprudence to so large a degree deals with the necessary conditions of man's social life, in all but its lowest forms, and is founded upon principles which are everywhere so clearly recognized as to seem self-evident. Although the law is the expression of the common will and is modified in a thousand details by the circumstances, or the native genius, of the race in which it is found, yet to a large degree it is the expression of very simple wants, and its development is by no means commensurate with the more intellectual and artistic temperament of a nation. Hence it is that laws are so easily transplanted from one nation to another, by the simple intercourse of commercial life. The arts of sculpture, music, or painting, which are so closely connected with the genius of the race, cannot be transplanted without, in a new soil, becoming entirely different products. But a large part of the whole body of laws which govern any nation is shared in common with other nations ; and each borrows from the other to no small extent. This exchange of legal conceptions, and often of actual laws, is part of the subject of Historical Jurisprudence ; and by it is established the postulate of jurisprudence, that there is



an abstract and universal science of right and justice, to which all local and temporary systems conform, and from which they derive much of their law.

Because of the disposition of the subject-matter of Historical Jurisprudence, the number of national systems of law calling for examination is relatively small. Many of the fundamental legal conceptions of modern times are clearly discernible in some of the earliest of those systems, and they attain, even in the most ancient days, to something very near their modern fulness and accuracy. Thus, the right of a mortgagor to redeem his property, the need of witnesses to prove the transfer of property, the payment of interest on loans, predial servitudes, — these, and hundreds of other legal conceptions, are defined in the customary law of Babylon. They also appear, in more or less complete form, in Egypt, though their form is occasionally altered. Back of these two nations they have not been traced; but from them they can easily be followed. They were handed on from the Phœnicians to Greece and Rome. Thence they passed into modern jurisprudence, by means of that great bridge which stretches between the ancient and modern worlds, — the Roman Law.

Besides the ancient laws which culminated in the Roman Law, there has been another form of ancient law which has been equally influential in moulding the legislation of the modern nations of Europe and America. This was the Germanic Common Law, which in its simplest form shows marked kinship to the earliest known forms of Roman Law and the curious survivals of primitive customs in that law. The Germanic element in modern law was, in its earliest form, the same as the Roman element, but during its slow growth and development it was more isolated from the influences derived from the commercial and other intercourse with nations of a superior and more ancient civilization.

It is the duty of Historical Jurisprudence not merely

to point out the contribution which each nation and race has made to the common product, but also to show how and why the law of one nation has been adopted by another. Again and again the laws of the conquered nation are seen to prevail over the conquerors, because the law of the conquered alone rendered possible the life and activity which made the conquest valuable, and appreciation and enjoyment of the conquest was possible only through maintenance of the laws. On the other hand, the laws of the conquerors are seen to be imposed upon the conquered, and adopted because the new life brought about by the conquest was in this way best stimulated to spring up and flourish wherever favorable conditions were present.

Yet more important than conquest for the diffusion of law was commerce, the peaceful intercourse of one nation with others. It was this that transformed the law of Rome from the law of a small Italian city to the law suited to the whole world—a law which has actually passed into the jurisprudence of every modern civilized state. With the decline of commerce, and the increasing crudeness and retrogression of life, law is seen to decline and the transactions of men to become limited to a few simple forms which could suggest but few legal principles.

The manner in which a work upon Historical Jurisprudence treats its subject must be determined by the method by which it traces the rise and diffusion of legal conceptions. It must have much to say of the earlier systems of the law. It must state with fulness the law as it appeared among the early races. But it will not be called upon to repeat this detailed account of laws and systems of laws, when the legal ideas which have appeared and have become common property are parts of some new system. If, when the common principles have been embodied in a code and made the subject of scientific study, the transmission, modification, and adoption, in

whole or in part, of that code or systematized body of law have been described, the duty of the writer will have been fulfilled.

The difficulties in the path of fulfilment are such as to render the task hopeless, were it not that a large part of each national legal system belongs to the common inheritance — is the resultant and satisfaction of the needs of man as man, however his status may vary because of environment and development. It is the element of common humanity — of likeness of thought and action, impulse and effect under like conditions — it is this inherent oneness that gives to historical as to comparative jurisprudence the promise of success. Therefore, the end set the science of Historical Jurisprudence is not hopeless. It may be achieved in comparative completeness; and the greater insight which is daily being obtained into the forces which have modified the laws will render the performance of the task more feasible.



# PART I

## *THE FOUNDATIONS OF LAW*

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### CHAPTER I

#### THE LAW OF BABYLONIA

##### SECTION I. — HISTORY AND SOURCES

THE law of Babylonia has had an immense effect upon that of nearly all the countries of Europe — probably more effect than that of any nation not of Aryan stock. The Babylonians were Semites; their language presents innumerable points of affinity with the better known Semitic languages, such as Hebrew and Arabic. The literature of Babylon has perished; but the element of culture which has endured was greater than the literature. That element is law, an organized intelligible system of rights and duties enforced by the State. The empire of Babylon was not merely an empire of conquest. The great work of the nation was the production of a system of law, necessary to the extended commercial activity of the city and produced by that activity. This was, by the very processes that called it into being, made a part of the world's life. The great and complicated transactions of the Babylonian merchants needed an elaborate body of law; and the same influences which brought into existence that mass of unwritten law, which in modern times passed into statute law, in other ages brought into existence the commercial or merchant law in a form hardly less elaborate. Wherever the Babylonian merchant went, he carried with him the law by which his business, in its extent and fulness, was made possible. He thereby became the pioneer of a higher civilization.

The Babylonian was not the originator of the law which he developed. He was the heir of a yet older civilization.

He found the seat of his future empire already occupied by a people of very different race and type. The Sumerian and Accadian races, which occupied the land about the Euphrates and Tigris, had, before the coming of the Babylonian, developed a very advanced civilization, stretching far back into the past. The Babylonian was able to receive and develop that culture. He was the heir, not only of the law, but of the conditions which gave birth to the law. The complex Babylonian civilization, which produced a commercial law in advance of any other ancient system,—certainly far more advanced than the law of Egypt, the only nation of antiquity which could be compared with Babylon,—was in no small degree the product of the natural features of the country and its relations to the other countries of the world. At home, the Babylonian was surrounded by land unsurpassed in fertility, and in susceptibility to cultivation equalled only by the valley of the Nile. Abroad, he was in easy communication, both by land and sea, with India. The great river bore his vessel to the Persian Gulf, and the seaport towns which sprang up testified to the profit derived from commerce. The navigation of the Persian Gulf is comparatively easy, and from the Straits of Ormuz to India is a far shorter distance than from the Straits of Bab-el-Mandeb, through which passed the vessels from Palestine and Egypt, after the dangerous voyage through the Red Sea. Again, Babylon lay in close land communication with the countries of the west, with Phœnicia, and through Phœnicia with all the countries of the Mediterranean. Caravans passed without difficulty from the upper course of the Euphrates westward to the coast. The wealth of the East passed through Babylonia.

Babylonian culture, and all that was therein implied, was founded upon the great factors of civilization, agriculture and commerce. The former bound a man to one spot, the soil which he cultivated and to which his labor

gave increased value. The nomadic instincts which might have been natural to the race—for there were Semitic nomads then as now—were overcome by the influence of agriculture. The shepherd requires a large expanse of land for his flocks. By the necessities of his occupation he is forced to wander over a large district. He is tied by affection to no one spot; the whole land is his home. He must, therefore, lead a solitary life, and his immediate family is often the only society into contact with which he comes. But the agriculturist finds that a small tract of fertile soil amply supplies his needs. He has opportunities for the accumulation of comparative wealth, and he lives in close proximity to his kind. The ampler life afforded him by the more productive employment, and the complex social existence given him by the proximity of neighbors, demand a more highly developed system of rights and duties than that of the nomad. There will first of all be the sense of ownership of that which before, at a date not inconceivably remote, was free and unappropriated. The herdsman could treat his sheep or goat in the same manner as any other chattel. He needed no more highly developed sense of property right than that of the degraded savage who clings to his rude weapon or the spoil of his skill in the chase. He defended his herds with the strong arm, and they accompanied him in his movements from place to place. But the agriculturist was bound to the soil. The more labor he bestowed upon it, the firmer was the bond. The sense of a right in the soil called for a system whereby land which he had made profitable might be secured to him by some certain tenure, might be passed on to his children or disposed of for an equivalent. The distinction between movable and immovable property—or personal and real estate, to use modern terms—became apparent. The application of common principles which might cover both classes of property was a discovery of the highest importance. For the right to land is a sort



of intangible right. It passes far beyond the original conception, which defined right as the power to retain possession.

The demands of trade were equally stimulating to the development of a highly complicated system of law. These operated in directions which indicate a very keen appreciation of the principles which underlie modern systems. In the simple commercial intercourse of the agriculturist barter was sufficient for all ordinary transactions, and neighborly comity sufficed for the adjustment of loans and debts of a simple kind. But in commerce, especially in the large transactions involved in trade with foreign countries, the loan became a matter of importance. Neighborly comity would not be sufficient to adjust the risks and profits arising from such conditions. In the conduct of his business, the merchant must have been frequently compelled to raise money on security. The fluctuations of the market required him to purchase at seasons when he was ill prepared to make immediate payment; therefore a system of credits was devised. In this and many other points, the legal system which arose in Babylon can be shown to be the immediate result of conditions which arise in every country at once agricultural and commercial. The result closely resembled the legal methods which to-day are recognized among merchants and enforced by the law of all civilized lands.

It is due to a fortunate combination of circumstances that the interesting legal code of Babylon has been partially preserved. The written laws themselves have almost entirely disappeared.<sup>1</sup> The few which remain are in most cases so mutilated as to be almost unintelligible, or are full of difficulties of interpretation. But a large number of legal documents have been preserved, thanks to the Babylonian methods of writing, and from these the law has

<sup>1</sup> Cf. Delitzsch and Haupt, *Beiträge zur Assyriologie und semitischen Sprachwissenschaften*, Bk. III, p. 493.

been reconstructed. Transactions were recorded upon tablets of moist clay. Witnesses — who played a very important part in the transactions of antiquity — were able to affix their seals if they could not write. Those who did not possess a seal could “make their mark” by indenting the clay with a finger-nail. A slight pressure upon the yielding surface was sufficient. The tablet was then baked, and remained as one of the most convenient and permanent records ever devised. The only record which was more enduring was made by means of engraving in hard rock, the lines being filled with lead.<sup>1</sup> In some cases an approach to this extreme form of durability was made. An egg-shaped piece of basalt was selected. On the upper portion were engraved representations of the deities under whose protection the transaction was placed; below was the record.<sup>2</sup> The reason for the employment of this form of record is obscure, but a possible clue seems to lie in phrases which emphatically refer to the permanency of the contract so preserved. A clay tablet was fragile and might be destroyed by accident or design. A more durable material therefore suggested itself to the parties to a permanent contract.<sup>3</sup>

A very large number of these contract tablets have been discovered. There are also extant the accounts of some important firms or families of business men. These accounts extend far into the past, and give a valuable clue to the private law of the Babylonians.

Another very important source of the knowledge of the private law of Babylon is the collection, made by King Asurbanipal, of ancient laws and translations thereof. These are all in one language, showing little trace of the

<sup>1</sup> Cf. Job xix. 24.

<sup>2</sup> See description of the Paris “Michaux Stone” in *Records of the Past*, Series I, Vol. IX, p. 92 ff. A picture of the stone may be found in Hommel’s *Geschichte Babyloniens und Assyriens*, Berlin, 1885, p. 74.

<sup>3</sup> See the account given by Oppert and Ménant, *Documents juridique de l’Assyrie et de la Chaldée*, Paris, 1877, p. 117 ff.

Sumerian. They seem to have been copied with great accuracy, and belong to the same period as many of the contracts which have been elsewhere preserved.

A third, and exceedingly important source of information as to the legal system of the Babylonians is found in the bi-lingual syllabaries, or dictionaries, of commercial and legal phrases in common use. These are invaluable as giving an account of transactions and methods common among merchants. The different rates of interest are mentioned, as well as the various forms of pledges, conditions under which loans were made and pledges returned, the varieties of leases, the method of measuring land, the rights of abutters, the conditions attending easements, the rights of tenants to improvements to real estate, the duty of repairing mortgaged houses, the forms of attestation — in short, an extensive enumeration and explanation of commercial and legal terms. These terms are given in the more modern Babylonian language, as well as in Sumerian, the ancient technical language which played much the same part in Babylon as law French once played in England. By these legal syllabaries the scribe, as well as the business man, was enabled to employ the necessary technical language which had ceased to be a part of the living language, and thus they retained that precision of expression which is essential to business transactions.

## SECTION II. — JUDICIAL PROCESSES

The exercise of judicial functions, at least in matters of commercial law, seems to have been in the hands of the hierarchy. The reasons for this may have been in part those which, in the mediæval period of European history, threw the control of legal procedure largely into the hands of ecclesiastics. In Babylon, the custom of documentary evidence in almost all transactions — a matter in which the whole legal system was in marked contrast with



that in use in Egypt during the same period — and the wide extent to which written contracts were employed, made the notarial and judicial functions of the priests very extensive. But the part taken in business transactions by the priesthood was appropriate for another reason, which perhaps had more influence in the time of the early law, before the purely commercial side had been developed. This was the part which was connected with contractual oaths, which at first were numerous. The contracting parties were obliged in their contracts to swear by the principal god of the country, and by the reigning prince, that they would abide by the conditions of the contract, that they were entirely agreed as to its provisions, and that they would not endeavor to set it aside. To this contract the parties affixed their seals, a number of witnesses signed, and the whole was dated. The official before whom the matter was arranged was always among the witnesses.

The custom of making contract records in duplicate does not seem to have prevailed as largely as in modern times, although it was employed in many instances. Possibly future discoveries will reveal a wider diffusion of the custom. The twofold contract was similar to the duplicate in part of its effect. In this form, one copy enclosed or covered the other. In this way the outer contract preserved the inner from any falsification as well as from destruction by time or accident. Ihering<sup>1</sup> bases an ingenious theory of transmitted custom upon this double system of tablets. He derives from the Babylonian practice the Roman custom of duplicating instruments. In the Roman system this practice was followed in the case of wills. The contents were repeated on the outside. The document was then tied, and witnesses sealed the cord which bound it. For all ordinary purposes the external statement sufficed; but if suspicion of any falsification

<sup>1</sup> *Evolution of the Aryan*, p. 206 ff.

arose, the inner copy would be at hand for comparison, and this was taken as the authentic document. This practice was afterward extended to other documents than wills. So, in Babylon, any tampering with the outside tablet could be discovered by referring to the inner document. The inner record could not be falsified without destruction of the outer.

Ihering, however, does not seem to have taken into consideration the fragile nature of the material employed and its liability to damage. But his conclusion from the Roman custom is suggestive, though he may be going a little farther than warranted in deriving this from that of Babylon. The hypothesis that the Romans borrowed the idea from Babylon is not necessary to explain the adoption of such a preventive against falsification.

As an illustration of the methods in use in the courts the following record may serve :—

“Ilu-bani, on his arrest (?), makes claim to the garden of Sin-Magir, which Mar-Martu bought. They went to the judges, and these brought them to the door of the goddess Nin-Marki. To the judges of the door of Nin-Marki Ilu-bani swore in the gate of Nin-Marki as follows : I am the son of Sin-Magir ; he adopted me, and my seal [*i.e.* the sealed contract of adoption] is not broken.<sup>1</sup> Thus he swore. Since Rim-Sin adjudged the garden and the house to Ilu-bani, Sin-muballit has laid claim to the garden and brought suit against Ilu-bani for it. They went to the judges, and the judges brought them before the . . . and witnesses, and in the door of Marduk, Sussa, Sin, Husa, and Nin-Marki, the daughter of Marduk (?) they placed them. The earlier witnesses of Mar-Martu in the door of Nin-Marki, where Ilu-bani

<sup>1</sup> This refers either to the destruction of the sealed contract as an evidence that the contract, or the relationship of which the tablet was evidence, no longer continued ; or to the breaking of the two tablets so as to falsify the contract record.

said, 'I am the son, it belongs to me,' adjudged the garden and house to Ilu-bani. Sin-muballit shall lay no complaint as to illegality, or bring any further suit against him. They swear by Sin, Samas, Marduk, and King Hammurahi. Before Sin-imguranni, the president of the court, Etelka-Sin, Apil-irristi, Ubarru, Zambil-arad-Sin (?), Ahia, Kab-dugami, Samas-bani, the son of Abi-dara (?), Zaninkasin, Izkur-Ea, Bauila. Sealed with the seal of the witnesses . . . :"<sup>1</sup>

In connection with the report of this case, it should be noted that there was an earlier suit, in which the plaintiff recovered the property. In both cases the form of procedure was the same. When the property was again in litigation, the verdict of the first court was regarded as evidence in the case. The witnesses were more than mere witnesses ; they seem to have been a sort of jury. It was they who adjudged the property to the legal owner. They served much the same purpose as that served by the jury in the earlier form of English procedure, where they were witnesses and jury as well.

### SECTION III. — PURCHASE AND SALE

It may safely be said that the formal instrument recording mutual contractual obligations was not the first form in which the tablet record was used. The demand for such evidence was not so pressing as in the transfer of real property. In this there was a necessity for some evidence that the land had been purchased from its former owner. With movable goods the case was different. The mere possession was *prima facie* evidence that they had been legally acquired. To prove ownership of land, especially where the land was not near the residence of the owner, needed some evidence of title in the form of a deed. From

<sup>1</sup> Meisner, *Beiträge zum alt-babylonischen Privat-Recht*, Leipzig, 1893, p. 43.



the necessity arose an elaborate form of conveyance. This deed frequently described the land with minuteness, and it was drawn after established formularies and solemnly attested. The following is an example of such a deed : —

“ A garden and a house, outlying property, on the upper side being the house of Sin-Istar, on the lower side the house which is the inheritance of the sons of Ubar-Sin, at one end of the street ; and at the other end, the narrow end, the house of Sin-azu. Sini-Istar, the son of Ilu-Irba, and Apil-ili, his brother, have arranged the price with Minani, the son of Migrat-Sin, and Ilu-Itura, his son, and have paid three and one-half silver minas as the full price. For distant days, for future times he shall not act contrary to this agreement. He shall call on the name of his king. Witnesses: Nabi-ilischu, the scribe; Ilu-ippalsa, the notary; Ibu-ikisca, son of Immaru ; (and seven other witnesses). His tablet agrees with the tablet of the witnesses. In the month Shebat, on the 26th day, in the year when King Ri-Agu conquered (?) the enemies and adversary.” There are attached two seals : that of Ramman-illat-šu, the son of Ani-pani-ili, and that of Ilu-ka-Ningirsu, the son of Apil-ili-scha, servant of the god.<sup>1</sup>

In this deed the extent of the garden is not given, but the bounds are described. The property conveyed was probably in the nature of a house-lot, on which stood the house — doubtless the chief matter in consideration. If the transfer had been of land, where the land itself was the principal consideration, as in the case of a farm, the extent of the property would be carefully stated. Note the following, from a later period : —

“ Twelve gi, which Gimillu and Balatu, sons of Kur-banni-Marduk, the son of the architect, have together received and not divided between them ; now Gimillu has died (?) Thereupon in the sixth year of Cyrus, King of Babylon, King of the lands, Bil-rimanni, the son of Nabu-

<sup>1</sup> *I.e.*, a priest.

bil-sumi, the son of the architect, who had received the share of Gimillu, divides the land with Balatu : 16 yards and 4 inches, the upper long side, on the west side of the house of Balatu ; 16 yards and 4 inches the lower long side, on the east side of the street Siknuam ; 15 yards (?) and 6 inches the upper side on the north of the passage way of Balatsu ; 15 yards and 6 inches the lower side, on the south side of the house of Bilsuma-iskun (son of Nabuzir-ibassi), son of the watchman (?), and the side of the gi, the dowry of Ludi, daughter of Nirgal-usallim, son of Igibi ; in all 15 gi, 10 inches, which Bil-rammi takes as his own portion of that which he owned in common with Balatu." Witnesses, etc.<sup>1</sup>

From the deed of a piece of land which is sold for a definite sum, to an instrument recording the exchange of one piece of land for another, is but a step. The following is an example of the latter form of deed :—

"The house of Hibta, daughter etc., lying on the side of the house of Nabu-kin-aplu, son etc., and on the side of the house of Nabu-istir, son etc., and on the side of the house of Marduk-nadin-ahi, son etc., and on the street Siknu, has been exchanged for the house of Nabu-balatsu-ikbi, son etc., lying on the side of the house of Nabu-istir-napsati, son etc., on the side of the house of Nabu-ahibassi, son etc., on the street Siknu. Nabu-balatsu-ikbi, son etc., has given in cash one-third mina, seven shekels, as the difference for his house to Hipta, daughter etc. They have given plans and dimensions of the plats of ground." After the body of the deed is the attestation and date, together with this interesting addition : "Tablets of the land, the object of the exchange, has each taken. The nail of Nabu-balatsu-ikbi, and of Hibta as her seal. In the presence of Hibta, daughter of Apla, son of the architect, mother of Nabu-balatsu-ikbi."<sup>2</sup>

<sup>1</sup> Cf. Peiser, *Babylonische Verträge des Berliner Museums* (Berlin, 1890).

<sup>2</sup> Peiser, *l. c.*, p. 183.

A sale, however, did not necessarily convey what might be called a permanent title. The seller could at any future time demand the restitution of the property on payment of the original sum with a customary or stipulated fine. This demand for re-conveyance might be enforced even after the whole amount of the purchase money had been paid and the property had passed into the possession of the purchaser. Indeed, the right to reclaim could be exercised even after the property had passed into the hands of a third party. Thus, Iddina-Nabu sold a slave to Habasir, who in turn sold him to a certain Tusai. Iddina-Nabu received him back on payment of the original price, together with interest.<sup>1</sup> It might be thought that this was merely a case of sale, and that the purchaser happened to be the original owner. Or the whole system might be regarded as a species of pledging, the slave being returned when the money was paid to the owner of the claim, in this instance the third party. Neither of these explanations can hold good in face of the stipulations usual in contracts of sale. The price of the article sold would be materially affected by the right of the vendor to regain his property at any time. There would be no security of property rights. There would be great risk in making improvements to property purchased. Business transactions would have been impossible in many cases. Yet the custom allowing such reclamation existed. Accordingly, this clause was often inserted in contracts: "The demand for the return of the property will not be made, the contract will not be altered, no claim will be raised by either party against the other," etc. The parties to the sale were able in this way to put themselves beyond the operation of the law. The rights of reclamation and redemption were abandoned. So ancient was the custom of renouncing the right of reclamation, and consequently the yet more ancient right of redemption, that the formula of

<sup>1</sup> Peiser, *op. cit.*, No. 4.



renunciation is found on the so-called Sargon stone.<sup>1</sup> In addition to the renunciation of this right, there was in most, if not all, deeds, at least in early times, a clause containing many imprecations upon him who should in any way alter or make void the contract. As time went on, this union of religious formulæ with business transactions became less frequent, occurring only in instruments connected with domestic affairs, such as marriage contracts. The conception of a contract as deriving its binding force from the power of the gods to avenge breaches of faith became unnecessary when business honor and the requirements of commercial life produced the same result.

The right of reclaiming property that had been sold did not lapse with the death of the vendor; it remained as a part of his estate. In case the heir exercised the right, the cost of redemption seems to have been augmented by a fine. No act of the original vendor could bar the right of the heir to redeem. The inconvenience of such future redemption must have been very evident to the commercial world, and provision against its exercise was early made. A member of the vendor's family — possibly all those who had any right of inheritance — appeared at the sale and signed the contract renouncing the right to redeem. In this practice is to be found the explanation of the custom of redemption. The property was not, at least in the earliest times, considered the private property of the vendor. It belonged to the family, and was administered by the head of the family; but he had no right to dispose of it. In the course of time, when the sense of common ownership had become weak, the individual controlling the property came to regard the property as his own, and sold it without scruple. But this action on his part could not bar the right of the family to redeem after his death. Their right had not been disposed of. From this would arise the right of reclamation during the

<sup>1</sup> Peiser, *Keilschriftliche Actenstücke*, pp. 8-16.

lifetime of the vendor. In all cases, the formula was to deny that the property had been sold, to affirm that the money had not been paid; by this practice the actual transfer was not denied, but it was affirmed to be of no binding force upon the family or the vendor. In case the vendor's family was not present at the sale, stipulations might be made as to the renunciation of the right of reclamation by the vendor, with proviso for redemption by his heirs. An illustration of this custom will be found in the following:—

“ . . . a certain piece of land with buildings, beside the Zammā Gate in the district of Babylon, etc. [locations, bounds, from whom purchased] he buys and pays in money one mina, seven and a half shekels as its full price, and gives in money two and a half shekels [obscure], in all one mina, ten shekels, as purchase money from the hand of Iddin-Nabu, son of etc., have Bil-ahi-irba, Ikisa-Marduk, and Bil-iter, the sons of Nabu-balatsu-ikbi, received as the full price of their house. There will be no reclamation, they will not alter this contract, nor make any claim against one another. If ever any of the brothers, sons, male or female relatives of the house of Bil-balatsu-ikbi make the claim, ‘the house has not been sold and the money has not been received,’ then he who claims the return must give the money which he has received, together with twenty per cent.” Witnesses, etc.<sup>1</sup>

As might be expected in a developed commercial life, there were provisions for claims because of the size or condition of the property not being as represented. The person who felt himself injured—as, for example, as to the size of a piece of land which he had purchased—could sue and recover the difference, even if the fault of measurement lay with him.

<sup>1</sup> Cf. an Assyrian deed in which the premium is fixed at ten per cent, *Records of the Past*, Series I, Vol. VII, p. 115: “He shall return with the tenth of the price to the owners. Then he will be rid of his contract; he has not sold.”

A contract of sale in which certain obligations remained to be fulfilled in the future would also give rise to a proceeding which might resemble the reclamation of property. But the distinction between the two cases was carefully maintained in the documents. In one class, there was a sale with no conditions as to the future. The money was paid and the property delivered. In the other, the title was conditioned upon the fulfilment of certain stipulated conditions, as in the following: "Before Nisan of the fourth year of Nirgal-sar-usus, King of Babylon, Nubta, the daughter etc., will bring one and one-third minas in money, the price of Banitum, Gussa, Si-heerat, and Nabu-supi-sukum, slaves of her household, and will give it to Nadin, son etc. If Nubta shall not have brought the money and given it to Nadin before Nisan, Nadin will recover his claim according to the agreement as to the price of the slaves. If she does not return the slaves to the possession of Nadin before Nisan, Nubta will bring the money and give it to Nadin."<sup>1</sup>

The theory according to which the conditions of this contract may be understood is that of a sale in which the articles purchased are pledged for payment according to the principle styled *hypotheca* in the Greek and Roman laws. This principle was originally borrowed from the Babylonian law. This will be more fully spoken of in the next section. It is to be noted that Nubta may return the slaves at any time before Nisan; *i.e.*, the January following the June in which the sale took place. After that date, she may not return them. It will then be Nadin's right to recover them, in default of payment.

#### SECTION IV. — MORTGAGES

Closely connected with certain features of sale, as held by the Babylonians, was their idea of mortgage.

<sup>1</sup> See Köhler and Peiser, *Aus dem Babylonischen Rechtsleben*, III, p. 36 f.



The mortgage in its usual form was a species of sale, in which the idea of the title remaining in the vendor was more clearly emphasized. Herein also was present the conception of the land as the inalienable property of the family, although the use of the land, as distinct from ownership, was subject to disposition.

No part of Babylonian law is older than that of the antichretic mortgage. The transaction might be regarded as a twofold loan, in which the use of the land was set against the use of the money, and the rent of the land regarded as the equivalent of the interest on the money. That antichresis was not the invention of the Babylonians is shown by the fact that constant reference to it is made in the Sumerian-Babylonian vocabularies which were commonly used by the scribes and others in preparing the contract tablets. From Babylon the antichretic form of mortgage seems to have spread to Egypt; certainly to Phœnicia and Greece, and to the west coast of India. The Chinese have developed a very similar idea, and among them mortgages are still made upon the same plan. But it is very doubtful if there is any connection of source between their custom and that of the Babylonians.

An examination of the antichretic mortgage shows that involved therein are several legal conceptions. Especially noteworthy is the clear idea of interest for money, which, although so familiar to-day, was by no means obvious to the ancients. Land would in the course of nature produce fruit; its crops were evidence of its value as a possession. But money was sterile by nature, not of itself productive. This argument was used in support of the mediæval idea that to take interest for money was wrong, was in fact a crime.<sup>1</sup> But when money was viewed as a medium of

<sup>1</sup> This opinion is found in many communities not under the influence of the Old Testament, such as the Cretans, who, according to Plutarch, regarded the taking of interest as robbery. See Plutarch, *Qu. Gr.* 53, p. 303 B,

exchange, representing in itself things capable of producing or rendering service, such as lands, cattle, slaves, or vessels, — a draft, as it were, upon the whole world, — then it would be easy to conceive of interest as allied to rent. This conception of money is clearly brought out in the mortgage contract tablet. The following, possessing peculiar and interesting features, is an example of such mortgages : —

“The house of Nabu-sum-lisir, son etc., which is situated beside the house of Nabu-sum-ibni, son etc., and beside the house of Gimillu, son etc., which Bil-ahi-idin received (?) for one and one-third minas of money as a pledge, and in order to rebuild (?) has taken and given to Nabu-bam-zir, son etc., under the condition ‘there shall be no rent for the house and no interest for the money,’<sup>1</sup> as a pledge for one and one-third minas of money for two years. On the day that Nabu-sum-lisir takes the house and gives Bil-ahi-idin the money, Bil-ahi-idin will pay the money to Nabu-bam-zir, and Nabu-bam-zir will give him full possession of the house. The money is the dowry of Zuma, daughter,” etc. Witnesses, etc.

Here we have a transfer of the mortgage, or rather the mortgage is used as a foundation for a second and antichretic mortgage. In this way a mortgage could be transferred as frequently as might be desired.

It is evident that only in a community in which there was a large and important commercial class would arise such a conception of interest as allied to rent. The agriculturist does not ordinarily so regard it. In a community where an active and large exchange was carried on, — where many persons were engaged in trade and it was possible for them to pledge their ancestral estates without loss of title, — where men were ready to advance money on land and then to find cultivators willing to take the land off their hands for a term of years, — only in

<sup>1</sup> The technical term employed in antichretic mortgages.

such a community would this idea spontaneously arise. The idea would be borrowed by others less advanced. In this way the land fell largely into the hands of bankers, these being ready to advance money and to find occupiers of the land pledged to them.

This form of mortgage was merely an exchange of uses. It was not an accommodation to relieve a temporary need. It was possible only where the returns from agriculture were very remunerative and there were many persons willing to undertake the cultivation of the soil. The amount borrowed was very often the full value of the land. There were many cases in which the value of the rent and the amount of the interest were not equal. In such cases the balance, on whichever side it might fall, was paid either as interest or as rent. Another variation occurred when the value of the crop was guaranteed. If the value of the crop fell below the amount due as interest, the borrower was obliged to make good the deficit; but when it was in excess of the interest, the lender retained the surplus.<sup>1</sup>

The antichretic mortgage was capable of yet further development. It was employed in cases of future use and possession, the object meanwhile remaining in the custody of the mortgagor. It was also employed as the penalty or result of an ordinary mortgage or pledge. In this form, the pledge remained in the possession of the owner, as in the Roman hypotheca; should the debt not be promptly paid, an antichretic mortgage would result without further action, and the lender could obtain possession of the article pledged, no further formalities being requisite.<sup>2</sup>

In the Babylonian law the advantage of the antichretic mortgage lay in the fact that on the failure of the mortgagor to pay the amount, the object pledged — generally a house and land — at once became the property of the mortgagee. No deed was needed to give title. The con-

<sup>1</sup> For a case of this see Peiser, *op. cit.*, p. 282 f.

<sup>2</sup> For an illustration, see Köhler and Peiser, *op. cit.*, III, p. 26.



tract tablet which furnished evidence of the *antichresis* was a sufficient deed. The ease with which money might be raised in this manner rendered the transaction very popular and led to considerable elaboration of the principle. In Egypt, where the *antichretic* mortgage, or what was almost identical, was greatly in use, title to the land did not pass to the mortgagee through mere failure of payment. There was need of a foreclosure.

In the commercial transactions of the Babylonians the ordinary chattel and land mortgage also played an important part. Of this there were several varieties, which may be divided into two classes. These are the already-mentioned *hypotheca* and the common pledge or pawn. The rules governing these need not be closely examined. The general principle was that the object pledged remained in the possession of the person who contracted the loan, and could not be used as security for a second loan until the first creditor had been paid in full. No other creditor could attach it. This is interesting as showing that the Babylonians pledged property of every description. It was not necessary that the property pledged should be in the possession of the mortgagor.

A contract for future delivery seems to have been sufficient security for a loan.<sup>1</sup> This is an example of the extent to which was carried the negotiable character of commercial securities.

#### SECTION V. — BANKING

An economic system in which financial conceptions were so highly developed, and in which commercial life was so active, could not fail to give rise to a business whose object was to furnish capital for commercial enterprises and to deal in negotiable paper. The transfer of mortgages and the loaning of money otherwise than in *antichresis* were

<sup>1</sup> For an instance see Köhler and Peiser, *op. cit.*, I, p. 27.

indications of that spontaneous development which in any intense form of social life provides those institutions necessary to the progress of society. The presence of a well-developed banking system is an added proof of this.

Banking is distinguishable from the mere loaning of money in two respects: first, the credit of the banker, based upon his reputation for solvency and fair dealing, is the security for money intrusted to him; secondly, he does not borrow or receive money for his own use, but for that of a third party. He acts as middleman between the man who has superfluous capital which he wishes to invest and the man who wishes to borrow for the purposes of his business. Such a middleman is necessary in any active commercial life.

There are several tablets of early date which refer to banking transactions, in which the banker receives sums of money as custodian. An example follows:—

“Ten shekels of silver, which according to his tablet of claim were deposited for Sini-Samar, has Sini-Samar received from Sini-Istar and Apili, his brother. He is paid in full. He will make no claim, nor bring suit. They swear by Hammurabi, the king.” Witnesses and date.<sup>1</sup>

The parties mentioned as receiving the deposit are known to have received many such loans, and to have been large money-lenders. It is noteworthy that there is no mention of interest to be paid. It is simply a case of deposit of money, for which a receipt was given, and the depositor now receives back his money and gives a receipt for it. Payment to a third party was often made by a draft upon a banker, whereby he was instructed to pay the amount of the draft from money deposited to the credit of the drawer. This is the beginning of the check system, and dates back to the earliest period of Babylonian history. It was, however, not an independent development of banking, but a

<sup>1</sup> Meisner, *op. cit.*, p. 29.

part of that larger system whereby every kind of commercial paper, as well as mortgages, circulated almost as freely as a bank-note does to-day.

Apart from the negotiation of mortgages and other large transactions in money, the demand for capital would naturally come from farmers, especially in the time of harvest, cash being needed to pay the laborers hired. These gave promissory notes; the date fixed for the return of the money is the end of the harvest. Examples follow : —

“The son of Ku-Istar has borrowed of Sin-Sinatu one-sixth shekel (?) of silver. On the day of the harvest in the month Sandutu he will return it to Sin.” Witnesses and date.<sup>1</sup>

“The son of Imqur-Sin has borrowed one-half mina of silver of Kikilu-Kisli. As interest he will pay for one mina twelve shekels [twenty per cent]. On the day of the harvest he will pay the money and the interest in its place.” Witnesses and date.<sup>2</sup>

That these loans were very common is shown by the large number of tablets referring to them; for it is probable that those tablets that were most numerous would survive in greatest numbers.

In many cases loans were made by priests, and even by priestesses. Indeed, it has been conjectured that nearly the whole business of banking was in the hands of the priesthood. This is by no means improbable, since the large endowments and ample revenues of the temples made their solvency a matter concerning which there could be no doubt. Besides this, the temple, as in other countries of antiquity, would, because of its sanctity, be a desirable repository for treasure. In a land as commercial as Babylon, however, the actual hoarding of treasure would be almost unknown.

Although the hierarchy played a very prominent part in the banking business of Babylon, the private banker

<sup>1</sup> Meisner, *op. cit.*, p. 21.

<sup>2</sup> *Ibid.*, p. 22.



was by no means unknown; indeed, it is probable that the business was as common as to-day. The transactions of many firms were of extremely varied character, and many which dealt in general commodities also did a large banking business.<sup>1</sup>

Money was frequently advanced upon the security of the expected harvest. The repayment was made in produce, the amount of produce not being definitely fixed. It was probably regulated by the price current at the time of payment, sufficient being given to extinguish the debt. An example of such a tablet follows:—

“Sin-mur-matīhas borrowed of Amat-Samas, the priestess of Samas, the daughter of Arad-sin, eight shekels of silver for the carrying on of the harvest. When he has ended the harvest he will repay it in grain.”<sup>2</sup>

When the loan was originally of grain, the return would naturally be in the same amount of grain, together with interest in the same medium. While the current rate of interest for money seems to have been twenty per cent per year, or twelve shekels in the mina, as it was expressed, the interest on loans in grain rose as high as thirty-three and a third per cent for the same length of time, or even for shorter periods. An explanation of this exorbitant rate may possibly be found in the relative value of marketable grain before and after harvest.

The origin of interest in Babylon has been explained<sup>3</sup> as the result of the extensive sea trade of that city. The fitting out of a ship was a matter of great expense. For at least a year, there would be no return of the money invested. To repay the cost of a long voyage, the cargo must be large. In addition to the cost of the cargo, there would be the necessary provision of a sum in cash wherewith to buy the return cargo, if the sale of the outgoing merchan-

<sup>1</sup> For instances see Peiser, *op. cit.*, *passim*.

<sup>2</sup> Meisner, *op. cit.*, p. 25.

<sup>3</sup> Ihering, *Evolution of the Aryan*, p. 191.

dise did not suffice. An extensive and profitable foreign commerce continually demanded capital. Others than the original undertaker of the venture would advance money and become partners in the venture. Ihering<sup>1</sup> says: "It would be absolutely impossible under the circumstances for the sleeping partner to control the actions of the acting partner, who might defraud him in his accounts of the prices of the goods, either purchased or sold. This consideration must necessarily have led to a system of sharing in the profits in proportion to the capital deposited. The lender was thereby precluded from any further claims, whether the undertaking yielded small or large profits. Here we have the system of interest." But a share in the profits, according to the amount of capital invested, is not what is understood by interest. That conception does not possess the essential condition of interest—the payment of a fixed sum, or a sum fixed relatively to the time for which the loan is contracted. *Evans* Interest is not payment for the use of land or goods; that is rent, which was very carefully distinguished from interest by those who were opposed to the latter on moral or religious grounds. Interest is payment for the use of money, or of anything convertible into money or used as a medium of exchange. In the proportional sharing in profits, the profit might be little or nothing; there might even be a loss to be met. Such a transaction would not be the payment of interest; nor would the guarantee of a fixed sum be payment of interest, unless there were added conditions. It is, however, quite possible that, for the better security of one or more of the partners, a system of interest might be substituted for the ordinary terms of partnership, based upon a division of profits.

The origin of interest was broader and more general than this. The demand for money would naturally suggest offering a premium for the loan. Money loaned for

<sup>1</sup> Ihering, *Evolution of the Aryan*, p. 191.

the short term from the planting of the grain to the sale of the harvest could, on its return, be again loaned for another brief period. Money employed in a sailing venture to India might not be repaid for a year, and thus could not be so frequently turned over. The premium paid in the latter case would naturally be high. In the case of money borrowed to repair an irrigating canal, the return in the shape of increased crops might not be sufficient to repay the loan in a yet longer period than a year; a yet higher premium would then be required. In other words, the premium paid would be proportional to the length of time for which the loan was made. This is the idea of interest.

Comparatively few slaves belonged to even the richest households. The farmer rarely possessed more than two, and generally he had none at all.<sup>1</sup> He was obliged to hire laborers to assist him in his harvest. These laborers must be paid and fed during the term of their labor, and often they were paid in advance, as in the following contract<sup>2</sup>:—

“Ramman-idinna, the son of Sin-rimini, has hired of his brother, Rabat-Samas, Ramman-Sarru, the son of Ini-Samas, for one year. As payment for one year he will pay six shekels of silver. As advanced payment, he has received one shekel of silver,” etc. In this case, two months’ payment was made in advance. In some cases, as much as three months’ payment was made.

Though the difficulties as to the shares of partners in foreign commerce were inadequate to explain the origin of interest, yet mercantile profits played an important part in determining the yearly rate, which in domestic

<sup>1</sup> Meisner, *op. cit.*, p. 7. “The number of slaves in ancient Babylon was certainly not very large. In the division of large estates often only one slave is reckoned; more than four slaves I have never found in the possession of one man.”

<sup>2</sup> *Ibid.*, p. 52.



loans varied from twenty to thirty-three and a third per cent. Agriculture and commerce contended for money; the returns from both were very large, and the amount of available capital, in spite of the enormous wealth, was comparatively limited.

In the matter of bottomry and marine loans, the Babylonians seem to have attained much the same position as that of the Romans, and it may well be that the principles in the Roman law of bottomry were indirectly derived from Babylon. The marine loan differs from the ordinary money loan, not so much in the rate of interest, as in the nature of the security. In the marine loan the security is the ship; if it is lost, the security is lost, and the loan is not repaid. There is, therefore, an element of risk, which in ancient times was much greater than in modern; and to induce the lender to place his money at such hazard, the premium must be relatively high. But risk and fear of loss are not matters which are determinable by mathematical calculation. Custom, feeling, temperament, will have great influence; the high rate will continue in spite of a comparative security. On this account, a marine loan would remain high, and the average profit be very great; much greater than purely economic reasons might lead one to expect.

The ground of assurance that the marine loan was well known in Babylonia is the presence of formulæ which could have been used only in such loans, and in fact referred directly to them. These formulæ are found in the syllabaries. These were apparently in general use, and contained both the Sumero-Accadian and the Babylonian terms. They would contain, in all probability, only those phrases which were in everyday use, and as they seem to have been compiled very much later than the beginning of the general prevalence of the Babylonian language, the presence in them of terms applicable to the sea-loan indicates very long continuance of the practice.

Among the phrases are such as the following: "The loan has perished along with the merchant," or, "the loan has been extinguished along with the merchant," "loan according to the custom of the city," and "loan in the form of a merchant-loan," etc.<sup>1</sup> As has been pointed out, the principle involved in bottomry was that the lender took the risk of the loss of the ship, inasmuch as the loss of the ship, the security, released the owner of the ship, the borrower, from the debt. In the case of the death of the merchant himself, an ordinary loan, "a loan according to the custom of the city," as opposed to marine loans, would be binding upon the heirs of the borrower. Not so in the sea-loan,

There could have been no such thing as a *fenus quasi nauticum*, or a loan in the form of a sea-loan, unless the custom of bottomry was already well established. This form of loan would be applicable in cases of special hazard, or where the prospect of any return was small. The invention of this form of loan very surely indicates conceptions which were prevalent in the earliest ages in Babylonia; it is the first reference in all history to foreign commerce: and at the time of the reference, the commerce was necessarily already far advanced. It has been stated by Ihering<sup>2</sup> that the Turanians—that is, the Accadians—did not live on the coast, and that possibly the reference to sea-loans might "simply denote participation in the equipment of some piratical expedition under guarantee of share in the booty." But if the origin of interest, as has been given above in opposition to Ihering, be true, the share in the booty could hardly be called interest; it would be a sort of dividend, or a profit derived from partnership.

<sup>1</sup> J. Oppert and J. Ménant, *Documents Juridiques de l'Assyrie et de la Chaldée*, Paris, 1877, p. 19 ff.

<sup>2</sup> *Op. cit.*, p. 195.

## SECTION VI.—CONTRACTS

The Babylonian Law developed to fullest extent the idea of a contract. Almost any possible business transaction was reduced to the form of contract and was executed with the same formalities — *i.e.*, with witnesses, notary, and signature. Thus the points as to deeds, sales, mortgages, loans, and banking are in no respect different in form from the matter of hiring, rent and leases, partnership, testaments, and domestic relations, including adoption. Transactions so very different could be reduced to the same principle, or brought under one head, only by a highly abstract conception of contract itself. From the forms of contract discussed in the preceding section of this chapter, we pass to the relations of master and servant, leases, and contracts for future delivery of goods.

*Sub-section A. Master and Servant.* — The relation of master and servant was regulated by a well-developed law. There being comparatively few slaves, men were hired either from day to day or for a definite time. In the case of the former, there were, naturally enough, no tablets, as such matters were hardly of sufficient importance to be reduced to writing; but a man might well make a record of a contract with another whom he hired for a year, or with whom he contracted to serve for a year. The time of service is mentioned in such contracts, as is also the amount of wages. A certain portion of the wages was generally advanced as earnest money. The following is an example of such a contract : —

“Ana-Samas-lisi has hired Ubarru of himself, for one month. He has received the wages of one month, namely, one-half shekel of silver. Samas-taiaru is the protector of his head.”

In connection with this contract, it should be noted that Ubarru was regarded as a free agent, hiring himself out.



But since he enters into a relation to his master in which he is temporarily in the condition of a slave, he has a representative, or guardian, Samas-taiaru, who protects his interests. This seems to have been customary.

In many tablets which have been preserved, the servant whose labor was hired for six months or a year had already contracted with a third party, and he was merely transferred to a new master. In such cases, the protector would not be mentioned, as the second contract between the original and the new master would be dependent upon the original contract between the servant and master. As an example of this form of contract, the following will suffice :—

“Ramman-idinna, the son of Sin-rimeni, has hired Ramman-sarru, the son of Ibni-Samas, for one year of Rabut-Samas, his brother. As yearly hire, he will pay six shekels of silver. He has received one shekel in advance.” Witnesses, date, etc.

This is a transaction not concerning a slave, but a free man who has become a contract-servant. This is shown by the Babylonian phraseology. In the case of a slave the name of the slave's father is never given. The slave is not regarded or spoken of as a man, but as a thing, and is reckoned in the same way as cattle. The actual point of this contract is the transfer of the right to a man's services. Such a transaction is but a part of the whole Babylonian system, whereby every credit or right was passed from one to another by means of contracts. Since the son was under the *patria potestas*, and stood to his father in much the same relation as a slave, the father in many cases hired him out and received the payment for his services.

The law was very strict as to the fulfilment of these contracts. The dates for the beginning and termination of the relations were precisely fixed. If the servant did not appear, he could be arrested and brought to his master, as he was his master's man. In return, the master was obliged to care for him, providing sufficient shelter, food,

and clothing, and was liable for any accident that might befall him in the course of his labor.

This species of voluntary and temporary slavery was of great importance and very customary in Old Babylon. It was retained to some extent in New Babylon; but, probably on account of the greater number of actual slaves, its importance rapidly diminished.

*Sub-section B. Rent.* — In the contract of rent, various forms were used, of which several are of interest. Houses were generally rented for one year, though occasionally the lease ran for a longer period. Thus, an eight-year lease has been found. The exact dates when possession begins and terminates are stated. A certain portion of the rent for the term was generally paid in advance; the remainder was probably paid during occupancy. According to some contracts, the tenant was responsible for repairs; and the condition is not infrequently inserted that the tenant “shall repair the beams and the wall.” He might make only trifling alteration in the property.

In the case of renting land, the conditions were somewhat more complicated. There was a species of ground-rent by which the tenant built, at his own cost, a house on land belonging to another. He thereby acquired a right to his house for a term of years, and at the expiration of that term the house fell to the owner of the site. Land for cultivation was generally rented for a term of years, — very often for three years, — and it was understood, even if not expressly stipulated, that the tenant should cultivate the soil in the customary manner, protect it from weeds, keep the irrigating machinery in good order, and water the field. If he desired to live on the land, and there was no dwelling, he would have to build one at his own expense. The rent was paid either in a fixed sum — often in produce — or in a fixed proportion of the harvest, frequently as much as two-thirds. There were some forms of lease according to which the rent was paid for

two years in produce, and for the third year in money. The following is an example of a simple lease of farmland : —

“Arad-Buene, the son of Taribu, Iddatu, the son of Belanu, and Ibbatu, have hired to farm for three years a field, so much as there is of it, in the land of Bit-Ziatu, beside the road of Martu and near Kubitria, which field belongs to Ibik-Mamu, the son of Ilusu-bain, from whom it is hired. For two years they shall pay for a Gan three hundred Ka of grain ; at the third harvest they must pay rent [*i.e.* in money]. They shall together build a dwelling. On the day of the harvest they shall divide the grain, whatever there is.” Witnesses, date, etc.<sup>1</sup>

#### SECTION VII. — PARTNERSHIP

In the lease last quoted we find three peasants hiring a field in common. It is an instance, on a small scale, of a commercial partnership. These men could cultivate the land among them without the aid of hired servants. Each furnished his own labor, and was responsible for his share of the undertaking. From this simple arrangement, whereby poor men might by combination have the advantages of the rich man who could work the farm by slaves, to the formal business partnership, there is but a step. The same causes that led to the formation of a company of peasants brought merchants together. In Old Babylon there was a scarcity of available capital and currency.<sup>2</sup> Capital seems to have been tied up in land ; partnership would in many instances be a necessity, especially in the case of mercantile ventures beyond seas. Examples of the actual articles of partnership are not preserved, except in very simple form ;

<sup>1</sup> Meisner, *op. cit.*, p. 62.

<sup>2</sup> Cf. Revillout, *Les Obligations en Droit Egyptien*, p. 346, where a number of securities are given by a woman to her eldest son, namely, a bill for one mina upon one merchant, one mortgage of half a mina and five shekels upon another, a credit of one-third mina upon still another.



but there are numerous records of the dissolution of partnership and the decisions of courts on the division of property.

It seems to have been customary for the partners in business to contribute equal amounts to the firm's capital, and to share accordingly, although there are cases, relatively few, in which the amount varied. The following is an example:—

“Two minas of money, belonging to Suna, son of Nabu-kin-aplu, and one mina of money belonging to Su-bil, the slave of Nabu-aplu-iddin, have they put together as capital for a firm with one another.”<sup>1</sup>

#### SECTION VIII. — FAMILY RELATIONS

*Sub-section A. Marriage.*—The matrimonial law of the early Babylonians shows clear traces of its great antiquity. Babylonian marriage retained the custom of purchase; the bridegroom paid to the father of the bride a sum of money agreed upon by the parties.<sup>2</sup> This was regarded as the purchase money of a woman, and not as an endowment of the bride. In the Roman Law the *donatio propter nuptias* undoubtedly had the same origin, though in time it came to be regarded as the bride's property; but in Old Babylon the development of the law of the family did not reach that point. The daughter, as was the case with the son, stood here, as in Rome, under the *patria potestas*, and was sold to the bridegroom in the same way that a son might be sold. But in spite of the barbarism of this conception, the position of the young wife was not that

<sup>1</sup> Köhler and Peiser, *Aus dem Babylonischen Rechtsleben*, II, p. 57. A slave enjoyed his *peculium*, or property that was his own. He could, with his master's permission, engage in business, paying his master a certain fixed sum each year in lieu of services. Hence the contract with a slave.

<sup>2</sup> In the case of the daughter of a priestess, the money was paid to the mother.

of a slave. She went to her husband with a considerable dowry, provided by her father, and she retained possession of it. Often the contracts of marriage not only specified the amount of money paid the father for the daughter, but made provision for a separation by divorce and for the amount of quit-money to be paid.

"Remu, the son of Samhatu, has taken in marriage Bastu, the daughter of the priestess (?) of Samas, Belisumu, the daughter of Uzibitu. . . . Shekels of silver is her gift; since she [*i.e.* the mother] has received it, she is content. If Bastu says to Remu, her husband, 'thou art not my husband,' then shall she be . . . ? and thrown into the water (?). If Remu says to Bastu, his wife, 'thou art not my wife,' he will give her ten shekels of silver as her quit-money," etc.<sup>1</sup>

In another contract<sup>2</sup> the husband binds himself to provide for a wife, who is the sister of his first wife, still living. It is a case of polygamy, which, though unusual, was entirely lawful. It stipulates that he "will care for her outfit and for her comfort, and bear her chair to the Temple of Marduk." The relations with the first wife, her sister, are carefully regulated, as also the relations in which the wives are to stand to their common husband in the matter of divorce.

In the marriage contract given above, the phrases, "thou art not my husband," "thou art not my wife," are parts of the formula of separation or divorce. In the case of the man, as generally in Semitic law, the opportunity for divorce was theoretically unlimited. The letter of divorce read somewhat as follows:—

"Samas-rabi has put Naramtu away. She bears her ziku (?) and has received her quit-money. If Naramtu is married to another, Samas-rabi will not love (?)<sup>2</sup> her more." Oath, date, witnesses.

A practical limit, however, was set to divorce by the law

<sup>1</sup> Meisner, *op. cit.*, p. 71.

<sup>2</sup> *Ibid.*, l. c.

that the husband had to provide his wife with liberal quit-money, usually fully as large as the amount paid to the wife's father on the marriage. When a divorce was executed, the woman was at liberty to marry another; was, in short, completely freed from the marriage bond. As to the possibility of a dissolution of the marriage bond on the part of the wife, there is no little uncertainty, owing to the difficulties in translation and interpretation of passages seeming to denounce the severest penalties upon the wife who uses the formula, "thou art not my husband." These penalties appear to be very extraordinary as occurring in a marriage contract. The wife is to be strangled, drowned, etc., according to varying interpretations.

During the marriage, the position of the wife in personal relation to her husband was that of subjection. In matters of property she was independent, and she could transact business independently, as far as her own property was concerned. In the later law, she appears as security for her husband, and even as his creditor. Indeed, there seems to have been no limit to the civil capacity of the Babylonian married woman. In relation to her children, her position was one of dignity and authority, and a son disobedient to his mother was punished with great severity.

The subjection of the woman to her husband, and her independence in matters of business, were parallel with the subjection of the slave to his master and his independence so far as his *peculium* was concerned.

*Sub-section B. Adoption.*—The formula of divorce, which must be solemnly pronounced before witnesses and with various ceremonies, resembled that which was employed in the case of adoption and emancipation. Here too no little confusion has arisen from the varying interpretations of the passages referring to penalties annexed to the offence of a son who said to his father, "thou art not my father." Some have supposed that he was subject to such penalties as branding, selling into slavery, and even cas-



tration. Whatever the penal consequences of such words might have been, when viewed as evidence of unfilial conduct or as a crime, they were constantly employed as a matter of course in cases of adoption, emancipation, and in advancing shares of property which would otherwise have been inherited. Thus, in adoption, which was by no means rare, the person adopted ceased to belong to his natural family, and became a member of a new family. He was therefore required to renounce his natural father; and his natural father renounced him, on receiving a sum of money for the loss of his services. In this way, the son was no longer the heir to the property of his natural father. The following is an early deed or contract of adoption :—

“Belit-abi and Tarum-ulmas have adopted Ubar-Samas, the son of Sin-idinna, from Sin-idinna, his father, and Bilitu, his mother. He shall be a son of Belit-abi, and Tarum-ulmas. Ubar-Samas is their eldest son. If Belit-abi, his father, and Tarum-ulmas, his mother, say to Ubar-Samas, their son, ‘thou art not our son,’ he shall leave the house and its appurtenances.<sup>1</sup> If Ubar-Samas shall say to Belit-abi, his father, and Tarum-ulmas, his mother, ‘thou art not my mother, thou art not my father,’ they shall put a mark upon him, throw him in bonds, and sell him for money.” Oaths, witnesses, and date. The adopted son is, accordingly, bound by the same law as the natural son, and is entitled to the same privileges.

The economic object of adoption was the necessity of increasing the household. The services of a son belonged to the father, and, as has been said above, he could be hired out, and his wages would be paid to the father. Children were therefore adopted when quite young; as

<sup>1</sup> See *ante*, p. 19, where the point turned upon adoption. It seems to have been alleged that, in spite of his adoption, the claimant had no title because, as was asserted, he had been emancipated. The claimant, however, successfully asserted that the rights of adoption had not been lost, inasmuch as he had never been emancipated.

they grew older they were taught a trade. But adoption was by no means confined to children. Many cases occur of the adoption of grown men. The advantage to the natural parent of the child or person adopted was an immediate cash payment. The advantage to the person adopted was in his share in the estate of those who adopted him. The advantage to those who adopted the person was in his services.

Emancipation by a father or widowed mother, without adoption into another family, was a striking characteristic of the Babylonian Law. It was a necessary accompaniment of the custom of advancing a son his portion of the paternal inheritance. Thus a son who was established in business might receive from his parent a portion of the ancestral estate in order to increase his available capital. The other children might consent to this, if it was clearly understood that it was an advance and not a gift, and that the son thus favored was cut off from sharing in the family estate on the decease of the parent. When a son received his portion, he was accordingly emancipated. The solemn formulæ, "thou art not my son," "thou art not my father," were employed, and the son was no longer regarded as a son inheriting with the others. It should be distinctly borne in mind that this was a purely civil transaction, for the benefit of the son in particular, as well as for that of the other parties concerned; and the fearful penalties that *appear* to be attached to the ancient law are entirely out of the question. The formulæ may have once had a criminal meaning; but by the time of Hammurabi (*circa* 2300 B.C.) they had already lost it.

An interesting contract of this sort is given by Hommel,<sup>1</sup> which, after an introduction containing the list of articles which Itilka-Sin and his wife, Sin-na'id, have given their son, Sin-malzu, before he was renounced, continues as follows: —

<sup>1</sup> *Geschichte Assyriens und Babylonien*, p. 381.

“His decision : Sin-malzu has said to Itilka-Sin, his father, and Sin-na'id, his mother, ‘thou art not my father; thou art not my mother.’ They must, therefore, give him silver as a compensation. And he has, according to agreement, since Itilka-Sin and his wife, Sin-na'id, have said in reply to their son, ‘thou art not my son,’ taken the house, the garden, and the appurtenances which were appointed for him to receive as his portion of the inheritance, and possession of them taken.” Oaths, witnesses, etc.<sup>1</sup>

In case of the remarriage of a widow, there might be need of similar action. Her property, acquired from her first husband, would be inherited by the children of the second marriage. The children of the first husband would also inherit property acquired by the second marriage. The following contract<sup>2</sup> seems to have been based upon some condition of this sort : —

“For future days, the following decision : Ilu-irba has said to his mother Schatu, ‘thou art not my mother.’ He is accordingly excluded from the house, garden, and appurtenances, whatever they may be. For future days, the following decision holds good : Schatu has said to Ilu-irba, her son, ‘thou art not my son.’ In consequence of this, he is excluded from the house, garden, and appurtenances, whatever they may be.” Witnesses, oaths, etc.

It is known from other tablets that Schatu was at this time a widow, and the son a prosperous banker. The contract suggests the probability that the mother was about to marry again, as she actually did, and that she had already given her son his share of her property or that he was sufficiently wealthy to do without what would have fallen to him at his mother's decease. It is impossible to think that the utterance of the formulæ was here a criminal offence. The consequences were merely disinheritation, and were based upon mutual renunciation.

<sup>1</sup> See Strassmeier, *Verträge aus Warka*, No. 102. Cf. Revillout, *op. cit.*, pp. 284, 311.

<sup>2</sup> *Ibid.*, No. 4.



## SECTION IX. — INHERITANCE AND TESTAMENTS

Wills, or documents disposing of property after one's death, were not known to the Old Babylonians. The earliest known will is that of Sennacherib, and in translation is a document of not more than ten lines.<sup>1</sup> That a man should have control of his property after death was antagonistic to the notion of possession which underlay Babylonian law, especially the law of real property. If, on account of that universal conception of ownership, a sale during life was not absolutely binding upon the heirs of the vendor after his death,—although the money price had been paid and possession given,<sup>2</sup>—and they might claim restitution upon payment of money and a suitable premium, it is very unlikely that disposition of property after death would be acknowledged. The property belonged to the family. As has been shown, a son might receive his share in advance; but unless that took place, the property was administered by the widow of the deceased, who managed it for her children. On the death of the widow, the property was divided among the children, with a slight preference, or increase of amount, given the first-born; but otherwise equally.

Should a man wish to make any other distribution of his property than that provided for by the customary law of succession, he made it during his lifetime, by a deed of the property to the person whom he wished to benefit. This deed of property might either be an absolute gift, whereby possession and enjoyment were then and there transferred, or, as was not infrequently the case, a mere transfer of title coupled with certain conditions, such as a

<sup>1</sup> See Rawlinson, *Cuneiform Inscriptions of Western Asia*, Plate 16, No. 3. This will is translated by Sayce in *Records of the Past*, Series I, Vol. I, p. 136.

<sup>2</sup> See *ante*.

life annuity to be paid the person conveying the property, or the transfer of the title with retention of the usufruct for life. In this way, all the important results of a testament were obtained, and the law, in spite of the primitive notions on which it was founded, made to conform to the demands of a more advanced civilization.

#### SECTION X. — THE INFLUENCE OF BABYLONIAN LAW

The legal ideas which have been stated above seem to have been in no respect peculiar to Babylon. They were the common property of all the dwellers in Mesopotamia. The documents by which these ideas are illustrated have, however, been derived from Babylonia. The legal conceptions that underlay the customary law of Assyria were, as far as they have been found, identical with those known to have been in force in the Southern kingdom. The civilizations of the two kingdoms were similar, and the whole system of law was not statute law, or law enacted by an authority, but a slow and spontaneous product of social conditions. The law of Babylon did not come to an end with the fall of the New Babylonian Empire. Innumerable tablets of a later date than the conquest of Babylon by the Persians have been preserved. The conquerors were, in matters of law, inferior to the conquered, as they had not been subjected to the same conditions. They adopted to a large extent the Babylonian law; it is certain that they adopted it in those particulars in which the genius of the Babylonians had achieved the greatest results. The extensive conquests of the Persian Empire diffused a knowledge of Babylonian commercial jurisprudence throughout a vast tract of country. That which was at one time the exclusive possession of one highly favored city became the property of the whole world; although much had already been done by the Phœnicians in spreading the law of Babylon.

## CHAPTER II

### THE LAW OF EGYPT

#### SECTION I. — HISTORY AND SOURCES

THE date of the foundation of the Egyptian Empire cannot be determined with any accuracy. The traditions of ancient nations often place the national beginning in a period so remote as to be evidently fabulous. The accounts of classical authors were of course based upon the traditions current in their day, and deserve no more credit than the accounts of natives ; indeed, they often deserve less credit, since the authors were at best but imperfectly acquainted with the language of the country they described. Whether the civilization of Egypt antedates that of Babylon is a question that is of little importance. For many centuries the two were contemporaneous. The real date of a civilization is not marked by its appearance in a certain year before or after a given era, but in the degree of advancement that it has made at that time. The Empire of Egypt, and with it the civilization of Egypt, may in this respect be said to be later than that of Babylon. The former presents types of social and economic life lower in the scale of development. But the actual chronology remains uncertain.

The computations of the date of Mena, the first king in the primal historic dynasty, greatly vary. The most remote date is that given by Bökh, 5702 B.C. ; the latest that by Meyer, 3180 B.C. — a difference of more than fifteen centuries. Lepsius gives 3892 B.C. as the correct date ; Bunsen gives 3623 ; Brugsch, 4400 ; Mariette, 5004, etc.



The date given by Meyer seems to be the most recent that is at all probable. But whatever may have been the actual date, it was much later than the appearance of the civilization that made an empire possible. And the civilization of Egypt lasted from that remote age until it fell a victim to the decay that reduced the ancient land to a Roman province. It survived the revolutions which placed thirty-four dynasties upon the throne. Egypt was conquered by more than one barbarous race. Persians, Greeks, and Romans also successively subjugated it. But, in spite of all, there remained an empire which preserved almost intact its customs, its art, its language, its laws, and its religion. The endurance of the language is proved by the fact that the key to the mystery of the hieroglyphic writings was found in the occurrence of the names of Cleopatra and Ptolemy, who were of the latest dynasties.

The causes that enabled Egyptian culture to survive the many shocks which it endured are not difficult of discovery. First, there was a favorable land. The narrow strip of arable soil<sup>1</sup> bordering the Nile was wonderfully fertile, and the delta was valuable as a source of food supply. Large crops were produced with but little labor, and the cost of living was almost incredibly small. A desperate struggle for existence retarded for many centuries the civilizations of less favorably situated nations. But in Egypt, with a large amount of comparative ease and luxury, the dense population<sup>2</sup> became broken up into

<sup>1</sup> In ancient times, Egypt as a country meant only this narrow strip. Cf. Herodotus II, 18. "Egypt is all the land watered by the Nile, and Egyptians are all those who live below the city Elephantine and drink the waters of the Nile."

<sup>2</sup> The population of what was the real country of Egypt, the Nile valley, was exceedingly dense. At present, the number of the population is not equal to that in ancient times, when it amounted to about seven millions, yet the number of inhabitants to the square mile is about 534. (Cf. Bädcker, *Reisehandbuch für Ägypten*, Leip., p. 41.) This proportion is greater than that in any European country. The actual surface of Ancient Egypt was somewhat less than that of Belgium.

various classes. Trades and professions of many kinds, classes of considerable permanency, increased the complexity of social life, and produced a riper culture than elsewhere could be found, the only exception being in the similarly favored empires of the Euphrates valley. So firmly established were the material foundations of Egyptian culture that no invasions of barbarous or civilized conquerors were able permanently to crush out the national life. Barbarians were conquered by the arts of the conquered. Civilized invaders were content with tribute. The wars waged by ambitious Egyptian monarchs to increase their empire seem to have had no permanent effect upon the people. The superior civilization rarely gains from the lower types which it overcomes. There were consequently no such profound economic and social changes in Egypt as those which followed the successes of the Roman arms. The changes wrought in the real structure of society, of which law is the expression, were slow and almost imperceptible, and they arose from causes to be found within the nation.

It is impossible to overrate the importance of agriculture as a constituent in the foundation of Egyptian national life and law. The other great factor of civilization, foreign commerce, has not the same constancy. For its success and continuation it depends upon the difference in conditions between countries. The rapid rise of one country to power and prosperity, or its decline, often means the overthrow, or at least the decay, of another, because of purely economic reasons. What was once a commercially dependent State becomes free. What was once a purchaser is so no longer; it has become either a competitor or a bankrupt. But foreign commerce, at least in the Early and Middle Empires, was contrary to the Egyptian character. The uncertainties, the rivalries, upon which the country might have been wrecked, were deferred. The one great nation which was strong at

once in agriculture and commerce was not brought into commercial rivalry with Egypt. By resting upon agriculture as the foundation of national wealth, Egyptian institutions remained permanent. The agriculture of the country was unique among nations. There was no possibility of impoverishing the soil. That which to other dwellers in valleys was a fearful calamity was a blessing to the inhabitants of the Nile valley. The periodical inundation of the waters fertilized the soil and produced a plentiful harvest.

But the conditions which tended to render permanent the Egyptian Empire were also those which were calculated to produce a developed customary law, or a body of private law which was universally binding and not dependent upon legislative enactment. In that law there was little or no development. There occurred in it no such revolution as that produced in the Roman law by the introduction of the *Jus Gentium*. There were no radical changes traceable to the influence of surrounding nations, as in Greek law. Egyptian law, throughout its history, remained fundamentally the same, even as the society of which it was the expression remained the same in spite of revolutions and invasions. The silent revolution in the social constitution, brought about by the rise of the sacerdotal caste to supreme authority, hardly disturbed the customary law.

No certain origin can be assigned to Egyptian culture and law. It is involved in the history of the race before the beginning of any records. Ethnographers, among them Robert Hartmann, have sought to prove the African origin of the race, and to point out the transitional types between the Egyptian and the Negro. Philologists, on the other hand, have connected the race with the inhabitants of Western Asia. The ground for this is the likeness between the language of Egypt, especially in its earliest known form, and that of countries lying eastward,



such as Syria, Babylonia, and Arabia. This does not hold good only in vocabulary, but also in the general grammatical structure of the language.

To account for the two species of facts justifying these opposite conclusions, it has been assumed that the upper classes of Egypt sprang from an invading race, and the lower classes from the aboriginal tribes. The Egyptians themselves, however, knew of no such distinction. They regarded themselves as autochthons. It is unlikely that the memory of such a radical distinction, if it ever existed, should have been lost or should have left no trace. But the uncertainty of the origin of the Egyptian race, and at the same time the appearance in the earliest dynasties of the characteristic Egyptian culture in all its splendor, render it all the more probable that that culture was neither the result of foreign influence nor brought by the race from a previous Asiatic home. It was indigenous; and the resemblances which may be discovered between the law of Egypt and that of Babylonia do not necessarily indicate indebtedness of one country to the other. The law of Egypt is too closely bound up with its whole social and economic order, is too nearly connected with the physical and spiritual conditions under which the Egyptians lived, to render probable any extensive borrowing. And, on the other hand, the conditions of Babylonian life were so closely connected with the development of Babylonian law as to render an indebtedness to Egypt for law and institutions a more difficult explanation of resemblances than the statement that in like civilizations similar causes might produce similar effects.

The original political system which prevailed in the Nile valley was not that of one kingdom, or even of the two kingdoms of the North and the South, but that of a large number of more or less independent "nomes," or cantons.<sup>1</sup>

<sup>1</sup> For a geographical description, with maps, of each nome, see Dümichen, *Geschichte des alten Ägyptens*, 1878, pp. 24-266.

Each was organized as a community by itself and had its centre of life and activity in the central sanctuary of its local god. But these nomes were not communities of free men. The vast mass of people were in a state of serfdom. They were peasants, working at the command of large landed proprietors. A free peasantry, such as was common in Greece and Italy, Syria and Persia, and in those countries formed the foundation of national life, was unknown in Egypt.<sup>1</sup> The nomes continued in existence until the time of the Roman dominion, and the surviving feeling of independence is well shown by the fact that during that period there was a war between two nomes because of an insult offered by one to the religious feelings of the other.<sup>2</sup>

The origin of the Egyptian kingdom was effected by the union of the different nomes. They were grouped into two kingdoms, of which the Southern, extending from the First Cataract to a few miles south of Memphis, was the more advanced in culture. The union, which the Egyptians regarded as the beginning of their history, seems always to have remained a personal union of somewhat the same kind as that between England and Scotland under the Stuarts. The king was the head of the whole department of justice. All honors flowed from him, and in him everything centred. He was regarded as the source of all right and law, as the very personification of justice. The title "Lord of Justice" was among his highest designations. He was the helper of every subject, the defender of the weak. In him the sun-god, Ra, "manifested his will and his beneficent ordering of the whole world." It was only in and through a kingdom where everything centred in a king, where there was the most complete political centralization ever known, that the unity of the land was possible and the law could be made

<sup>1</sup> Meyer, *Geschichte des alten Ägyptens*, 1887, p. 25.

<sup>2</sup> Cf. Plutarch, *de Is.*, p. 72.

uniform. The separate nomes were everywhere under the same law, and by this uniform subjection to a law which was regarded as the will of the king, the royal power was maintained.

It should be noted that this uniform legal system was possible only in a land in which communication was easy and culture sufficiently advanced to render writing an accomplishment known to a great number. The vast empires of antiquity were elsewhere built upon a system of tribute. Practical independence was allowed to the various portions of the empire, and little success attended any efforts to consolidate such an empire by means of a uniform governmental and judicial system. In Egypt the king was the supreme judge of the whole land. In the ordinary administration of justice, as in other matters of administration, he was represented by his prime minister, who in judicial matters was assisted by the judge of Nechen.<sup>1</sup> Under the prime minister were the "Great Men of the South," the number of whom was ultimately fixed at thirty. These exercised authority throughout both kingdoms, and were at once executive and judicial officers. In fact, the whole civil system disregarded the distinction between departments of government. To such an extent was this carried that the same persons were almost always employed both as judges of the local courts and as governors of the principal towns. They had numerous assistants, and the free citizens of the towns and the contiguous lands were under their immediate authority. The administration of justice in the rural districts, where the inhabitants were merely serfs, was for the most part intrusted to "field judges," who had cognizance in those simple matters peculiar to rural communities.

This was the theoretical system of the earliest dynasties; but very soon the judges seem to have remained at

<sup>1</sup> Nechen, or Nechebt, was the Greek Eileithyia, the modern Elkab. It was the capital of the Southern Kingdom.



the court of the king and to be represented at their posts by minor officials. Their relations to the civil administration became less and less, and they were finally superseded by the nomarchs. Thus was carried yet further that centralization of government which was the most striking feature of the earliest Egyptian constitution. These nomarchs did not at first inherit their offices, however, though the same position was held by father and son for many succeeding generations. Each high official began his career in a subordinate office and worked his way up to the position which he ultimately filled. In many cases this was the position which had been his father's; but he had shown his fitness to fill it.

Such a condition could not be permanent. Attempts were made to prevent the offices from becoming actually hereditary; but the change was made during the sixth dynasty. The higher officials became identified with the hereditary nobility. Their authority was exercised in those districts in which their property chiefly lay. Their power became greater and greater, until they became practically independent. The conflict between the authority of the landed nobility and that of the king brought about the decline and collapse of the Ancient Empire. A new dynasty, the eleventh in the list of Manitheo, established the monarchy at Thebes.

The Middle, or Old Theban Empire, began with the eleventh dynasty about 2200 B.C. Amenemha't I (about 2130)<sup>1</sup> of the twelfth dynasty may be taken as a representative of the most brilliant period. His position was much the same as that of a feudal sovereign. The nomarchs were vassals. Each nomarch ruled his own district and was at the head of civil administration, which was practically independent of any external authority. He owed certain duties to the king, but in other respects he was lord in his own land. The effect of the position

<sup>1</sup> Cf. Meyer, *op. cit.*, p. 13.

of the nomarchs as a hereditary aristocracy exercising almost sovereign power, was to separate the departments of State, dividing the administrative from the judicial. The former had been almost entirely monopolized by the nobility. The latter was firmly retained by the king, who made royal progresses through the country for the purpose of administering justice. Thus it is said of Amenemha't: "He extirpated injustice, gleaming as the sun; he restored what had fallen into disorder; he divided the cities from each other and caused each city to know its own boundaries; he set their boundary-stones, that they might stand as firm as heaven; he took cognizance of their watercourses<sup>1</sup> according to documents, and investigated them in the ancient records; for he loved justice greatly."<sup>2</sup>

The thirty "Great Men," or magnates of the South, appear in the Middle Empire no longer as rulers of nomes or as taking part in the administration of these communities. They are employed solely as judges, and constitute the "Court of the Thirty," a kind of supreme court. The royal courts were concerned with the rights of all classes. They were independent of the local feudal lord, and found abundant employment in the innumerable cases which arose in the densely populated country. The structure of society was vastly more complex than in the Old Empire. Besides the serfs, there were many peasants who were freemen and landowners; there were mechanics among both serfs and freemen. Society was not divided into nobles and laborers. There was a large middle class, many members of which were wealthy, possessed large estates, and lived in luxury. Doubtless among them were many business men, large as well as small dealers.<sup>3</sup> At this period a considerable commerce

<sup>1</sup> I.e. the canals that admitted the water from the Nile.

<sup>2</sup> Lepsius, *Denkmäler*, II, 124, 36 ff., *ap.*, Meyer, *op. cit.*, p. 157.

<sup>3</sup> Cf. Meyer, *op. cit.*, p. 168.

was established on the Red Sea. Yet the native institutions show little or no trace of foreign influence.

The Middle Empire was of short duration. The thirteenth dynasty began in 1930.<sup>1</sup> One hundred and fifty years later began the rule of the Hyksos ; it continued until 1530, when the Hyksos were finally driven out. These rude conquerors had ruthlessly destroyed cities and plundered temples. They were, however, unable to overthrow the fundamental institutions of the land, and were themselves, to some extent, won to the Egyptian modes of thought. They assimilated their religion to that of the country, and their kings assumed the titles peculiar to Egyptian monarchs. Their expulsion was the result of a long war, in which the princely family of Thebes, with the assistance of other Southern nobles, established an authority and force sufficient to found the New Empire. The Hyksos retired to their original home in Asia, and then disappeared from history. The New Empire, which may be said to date from A'alemes, the first of the eighteenth dynasty, took the place of the old régime. This empire achieved great foreign conquests, and the three Rameses and Seti I made this epoch brilliant in the history of Egypt.

In its constitution the New Empire generally resembled the Old. It was not a feudal monarchy, as was the Middle Empire. The nobility remained ; but it was a nobility which derived its honors from personal relation with the king. The whole kingdom was organized on a military system. The constant wars against the Hyksos had for the first time developed a distinctly military spirit. At the head of an armed State stood the king, whose power was absolute. He derived his revenue from a general land-tax of one-fifth of the total produce. From this tax, however, the temple endowments were exempt.

<sup>1</sup> According to Meyer, *op. cit.*, p. 13, whose dates are for convenience here followed.



The courts of the New Empire were in the hands of the priesthood, which in this period attained its greatest power. The "Court of the Thirty," which traced its origin from the earliest days, disappeared for a time at the period of the Hyksos invasion. The membership of the new courts was constantly changing; even from day to day there seem to have been alterations in their composition. The rule of this change is not known, but it may be that the judges, who are mentioned in the court records as constituting the "court of this day," served in rotation.

The New Empire lasted from 1530 B.C., the beginning of the eighteenth dynasty, through the twenty-first, or until 930. The succeeding centuries witnessed the tremendous conflicts with the empires of Western Asia, the establishment of foreign dynasties, the restoration of native rule, the conquests of Alexander, and the varying fortunes which followed the breaking up of his empire. Yet throughout the great revolutions which the land had experienced, its fundamental legal conceptions seem to have remained constant. The disintegration produced by the changes introduced in the Greek period is a proof of the extent to which the law was a natural expression of the whole social system, because based upon permanent material conditions.

In the midst of the confusion that reigned after the fall of the New Empire, there appeared a king whose influence upon the history of Egyptian legislation was greater than that of any other monarch. This was Bocchoris, of the twenty-fourth dynasty (772-729 B.C.). His importance lies in the reforms which he introduced in several branches of legislation. To him are attributed such changes as the rule that, in the case of debt, the debtor's property, but not his person, might be attached; that interest might not amount to more than the original indebtedness; and that when a contract was verbal, the oath of the defendant was sufficient defence. Because of the confusion of the time and the results of invasion, the weakness of the

Empire demanded some reformation of the law, the administration of which had certainly become lax under the preceding dynasties.

The persistency of the legal methods in vogue may be seen in the reports of Diodorus as to legal procedure in Egypt. The Thirty Judges reappear, ten from each of the cities of Thebes, Memphis, and Heliopolis. They were men of proved probity and learning, and they were paid ample salaries. One of their number was chosen president of the court, and another member was chosen from the same city as that of the president to make up the full number of thirty. In order to give the greatest amount of assistance to those who were wronged, justice was administered without cost.<sup>1</sup> The course of procedure was as follows: The President having taken his seat and assumed his badge of office, the figure of Ma, the Goddess of Truth, and the eight volumes of the laws of Egypt were placed before him. These volumes contained not only actual laws, but also precedents and opinions of famous judges and lawyers. The complainant then set forth his case, which was presented in writing; the written statement contained all the particulars on which the claim was based, as well as the amount of damages claimed. The defendant then filed an answer to the complaint, either denying or demurring to each charge, or, if driven to his last resort, claiming that excessive damages were demanded. The complainant replied in writing, and the defendant was allowed a further reply. The papers, which bear a close resemblance to the modern systems of pleading, were prepared outside the court. They were then presented for the approval of the court. If there were any witnesses, these were next heard. The case was then decided by the court, and the President pronounced judgment by touching the gainer of the cause with the figure of the Goddess of Truth, which he wore as a badge

<sup>1</sup> Cf. Herodotus, II, 160.

of office. There were no oratorical appeals ; all was submitted in writing. This was done that the judges might be swayed, not by eloquence, but by the merits of the case.<sup>1</sup>

The sources of Egyptian law have not been preserved as well as those of Babylonian law. There were no handy and durable methods for recording contracts ; indeed, before the reign of Bocchoris it was not the custom to reduce contracts to writing. Hence the remains are scanty. The later period, from Bocchoris on, is, however, amply represented, and after this dynasty the investigations of the Egyptologists show comparatively certain result. Thus Revillout, in his work *Les Obligations en Droit Égyptien* (Paris, 1886), begins with Bocchoris and uses the numerous demotic documents as a foundation for legal history. There is undoubtedly great justification for this method of using the sources. Reasoning by analogy, it is most probable that the state of Egyptian law and jurisprudence remained constant. Other nations, notably Babylon, were subjected to variations of fortune as great as those undergone by Egypt, yet they retained their form of law. In Babylon, indeed, the law under the Persian dominion is the same as that found under the earliest kings, as is demonstratively proved by the contract tablets.

## SECTION II. — PROPERTY — OWNERSHIP AND POSSESSION

The law of Egypt concerning property presents many contrasts to the ideas prevailing in other systems. This most strikingly appears in the distinction as to the classes of property, which underlies much of the law. The familiar modern distinction between realty and personalty was unknown, and the principle of division was purely objective and had no connection with the forms of action by which property was recovered. It was based upon the

<sup>1</sup> Diodorus, I, 76.



idea of mobility ; but the distinction was carried further than in the Roman law. There were four classes of property. The first was that of immovables, to which belonged land ; the second, movables which were inanimate, such as tools, clothing, money, etc. ; the third, movables which were animate, such as animals and slaves. The fourth class was somewhat anomalous ; it comprised all incorporate forms of property, such as abstract rights and interests.

The forms by means of which the different classes of property could be sold or pledged, and by which their return was governed, in some respects resembled those of the Romans. The more solemn forms of alienation were reserved for the sale of land ;<sup>1</sup> but movables might generally be transferred by simple delivery. A pledge of land or immovables might take the antichretic form. The loan of an animate movable could be satisfied only by the return of the specific object loaned, and the same rule applied to many inanimate objects. But certain property might be returned in kind, as in case of grain or other comestibles, or of unwrought metal. This distinction as to return of the specific object and return in kind, which underlies the introduction and general use of any current medium of exchange, although made very early, does not seem to have reached its legitimate development as it did in Babylon. The stage reached in the evolution of the consideration was rather as that of early Rome, where the presence of the *libripens* was an essential feature of every sale.

The second fundamental characteristic of the Egyptian law of property was the radical distinction made between ownership and possession. This distinction, which in some form was common to other ancient systems, was in Egypt carried further, and produced results which were more far reaching, than elsewhere. By means of a deed,

<sup>1</sup> Cf. *res mancipi*, *post*.

ownership could be transferred without the transference of possession, and *vice versa*. It is evident that much the same effect could be produced by certain forms of leases and mortgages. But these latter contracts, which play so large a part in modern jurisprudence, are based upon the conception of ownership as including all rights to the property and of the owner as divesting himself of one or more of these rights. This conception did not exist in the Egyptian law. Ownership did not include the whole sum of rights in property. It merely gave the right to acquire possession on the performance of certain acts by the owner and by the possessor. Yet it was a valuable interest. It passed from hand to hand, either *inter vivos* or by descent. It could be pledged as security for a loan. An analogy may be found in feudal tenure, in which possession was distinct from ownership and both rights could be vested independently in different persons; and these might change from time to time, without disturbance of existing rights. But the Egyptian form differed from this tenure, inasmuch as the land need not be held from a superior — although such was in fact often the case because of the debts to secure which ownership had been pledged or sold to the nobles. When landed property passed *inter vivos* it was passed either by a deed conveying ownership, or deed conveying possession, or by both. Until the second deed, whereby possession was alienated, the vendor called the property his. In the final act, he said, "I transfer to you your house, which you have bought of me."<sup>1</sup>

The origin of this conception is wholly obscure. The Egyptian law shows no signs of any theory whereby property was acquired otherwise than by sale, there being no theory of title by occupation. Title by prescription was also unknown. The conditions of life in Egypt were wholly unfavorable to any such acquirement of title.

A system of land registration prevailed in connection

<sup>1</sup> Cf. Revillout, *Les Obligations en Droit Égyptien*, p. 103.

with the registration of all subjects of the king. The taxes and other imposts were thereby primarily regulated, but the land system was at the same time profoundly affected. The registration also provided a species of title deed. The proprietor of a piece of land was registered as such, and the transfer from one party to another was easily traced. This became a matter of very great importance in the later dynasties, when a tax was laid on all acquisitions, whether *inter vivos* or through death. The validity of the transfer depended upon the payment of this tax. It was quite different in communities where the constant wars with surrounding tribes, the occupation of conquered lands, and the movement of citizens, rendered a registration system impossible and the title to property sometimes doubtful. The deep impression which migrations had left upon both Roman and Hindu produced theories as to the acquirement of property in many respects alike ; but of this no trace is to be found in Egypt. The apparent resemblances to feudal tenures, leases, and mortgages are misleading to the casual observer. There seems to have been a fundamental connection between the antichretic mortgage of Egypt and that of Babylon. But whether the antichresis grew out of the distinction between ownership and possession, or *vice versa*, cannot be determined. It is most probable that the antichresis was the later legal conception.

In spite of the highly developed conceptions of ownership and possession, there does not seem to have existed a correspondingly developed theory of sale, such as at a comparatively early date arose in Rome. This apparent omission in the legal history of the Egyptians may be partly due to ignorance of the daily legal life of early Egypt, owing to the almost entire absence of early records. During a large part of their legal history, the Egyptians retained a ceremonial transfer in person and before witnesses. In almost all other acts of life, the recording of



every detail was hardly less than a passion with the nation ; on all their monuments scribes are depicted in the act of recording accounts. Yet the earliest deeds of sale are evidently the mere report of the actual words employed in the transaction.

One cause which rendered the sale a comparatively unimportant part of Egyptian law was the very small amount of commerce which was transacted. The recording scribes appearing in the pictures on the walls of tombs as so busily occupied in writing, were almost always engaged in keeping accounts of the operations of agriculture, or of the payment of tribute or rent. There was little or no need of elaborate bookkeeping in the small commerce which was carried on ; and similarly the complicated laws of sale which arise spontaneously in every mercantile country, or are imported from abroad by visiting merchants, were entirely wanting in Egypt. There were also comparatively few of those transfers of land, which have in so many ways influenced law. Land descended from father to son, as in every stable community. There was no need, and little opportunity, for much movement. Sales of land were therefore infrequent.

### SECTION III. — CONTRACTS

Contract, as it appears in Egyptian law, was essentially unilateral. The idea of mutual obligations does not seem to have been one easy for the primitive mind to grasp. The antecedents of the bilateral contract may be found in the theory of sale, and of the unilateral in that of the loan. In the one, there is the exchange of values ; in the other, there is the assumption of an obligation. A certain correspondence might be pointed out between the act of sale or loan and other forms of contract. The difficulty in distinguishing between their fundamental conceptions prevented the rise of a bilateral contract during that period

when the principal legal ideas find their origin in the life of the nation. Even a sale, which seems essentially an exchange of values and in a primitive country would, *a priori*, be likely to retain some trace of its origin, tended toward a unilateral conception. In Rome the purchaser took possession. In Egypt the vendor transferred possession. In each case, emphasis was laid upon the act of one party.

The following contract is the earliest known, and illustrates the form and spirit which ran throughout much of Egyptian legal history. It is, however, of a more complicated character than most surviving contracts, and in some respects approaches the form of the bilateral contract.<sup>1</sup>

“Contract concluded by Hapdefa’e, the prince and chief prophet, with the official staff of the temple, that they should give him bread and beer on the 18th Thoth, the day of the festival of Uag, whilst he should give them twenty-four temple-days out of his property, from the estate of his fathers, and not in any way out of the property of the estate of the nomarch ; in fact, four days for the chief prophets, two days for each of them.

“Behold, he said to them : —

“(1) A temple-day is  $\frac{1}{360}$  of the year. If all the bread and beer and meat that is received daily in the temple be divided, the  $\frac{1}{360}$  of the bread and beer and of everything that is received in this temple is a temple-day, which I give to you.

“(2) It is my property from the estate of my fathers, and not in any way from the property of the estate of the nomarch, because I am indeed the son of a priest, as each of you is.

<sup>1</sup> For forms of contracts see *Zehn Verträge aus dem mittleren Reich*, by Adolf Erman, in *Zeitschrift für Ägyptische Sprache und Alterthums-kunde*, XX, pp. 159-184. Cf. also *Life in Ancient Egypt*, by the same author, London, 1894, p. 145 f.

“(3) Three days form the remuneration for each future staff of priests, that they may deliver to me this bread and beer which they shall give to me.

“Behold, they are therewith content.”

To understand this contract, it is necessary to bear in mind that Hapdefa'e was himself nomarch of Sint in the time of the Middle Empire, and was a member of the priesthood; in fact, he was chief priest of the temple, with the priestly college of which he makes this contract in order to provide for an offering, and other devotions, before his statue, which was to be erected. By another contract, he bound the priests to illuminate the statue. In all, there were ten contracts inscribed upon his tomb—the most important record of civil transactions before the time of Bocchoris. The consideration named in these contracts generally consisted of renunciations, on his part and that of his heirs, of certain hereditary rights in the income of the temple. The priestly college figures as a corporation capable of concluding a contract and being bound by one. Hapdefa'e, in his private capacity, contracts with himself, in his official capacity. As Erman well says: “A people who could so clearly grasp the double nature of an individuality, so as to allow him to conclude contracts with himself, was certainly long past the time of judicial infancy, and had attained to a highly developed legal status. Unfortunately, there is barely any material from which we can learn much of the subject.”

The binding force of a contract was not due to the form in which it was made, although the well-known Egyptian love of ritual might seem to indicate this, but to “the expression of will and consent” which was shown in the contract. If the person attempting to make the contract was in the eyes of the law incompetent to perform such an act, the transaction was void. This is proved by the fact that a contract made by a minor,—such as one made



in connection with his parents in case of the sale of family property,—if unfavorable to his interests, might be repudiated by him, as far as his interest was concerned, when he attained his majority. Still further proof is found in the form taken by every contract. The contracting party, whether in a sale or any other form of contract, detached from himself a right, and conveyed it to the other party. It is the vendor, not the vendee, who speaks.<sup>1</sup> The vendor was obliged to warrant and defend the title which he conveyed, as there was no title by prescription. In the case of a law where the idea of sale lay in the taking by the purchaser, prescription and *in jure cessio* were part of that law; and less stress is laid upon the will of that contracting party who is laid under obligation. His act counted for little.

#### SECTION IV. — LOANS

The fundamental form taken in Egypt by obligations was that of a loan. In this respect, the line of thought was the same as that which produced the *nexum*, which for centuries was almost the only form of obligation known to the Romans. In the Egyptian loan the property might be returned in kind, or specifically. In the former case, it was customary to state the rate of interest to be paid—much in the same way as in Babylonian loans. The borrower promised at a fixed date to return or pay to the lender a certain sum of money. This sum included both the original amount borrowed and the interest. In this way, a loan might be made to bear almost any amount of interest, although the legal rate was fixed at 30 per cent, or  $33\frac{1}{3}$  per cent in case the loan was in corn. The stipulation to pay a fixed sum was probably a somewhat late invention, resorted to in order to escape the effect of the law ascribed to Bocchoris, which forbade interest to amount to more than the principal. The effect of this

<sup>1</sup> Cf. Revillout, *op. cit.*, p. 16.

evasion was to oppress the borrower, inasmuch as the full amount of the debt was to be paid even if the debt were discharged at a date prior to the time fixed for its maturity.

The ease with which the form of a loan could be used to create an obligation may be illustrated by the case of the marriage portion of the bride, which the husband guaranteed to apply to the personal expenses of the wife, or as "pin money." The husband's estate remained intact; but the amount necessary to provide the pin money was treated as a loan from the wife to the husband. In the same way, any gift to a wife could be regarded as a loan, the property not being actually transferred, but reserved to the use of the wife. A claim was thereby created which was enforceable against the estate of the husband.

#### SECTION V. — LEASES

The Egyptian lease was in three forms. There was a form which was no more than a metayage, or farm lease wherein a fixed portion of the produce is paid as rent, the expenses being shared; a second form, in which the lease gave yearly holding at a fixed rent; and a third form, in which the lease closely resembled a mortgage. The first of these forms was particularly appropriate in case of lands given as endowments to temples, or those belonging to large proprietors. There is in this form a certain simplicity of conception which points to its great antiquity. The portion of produce taken was a species of tribute, such as would be exacted from a conquered race. Under this lease the same family might remain on the soil for many succeeding generations.

The second form of lease provided for a fixed yearly payment. Here also there was the element of permanency. The economic conditions of Egypt favored fixity of tenure; and no matter how short the period for which the land was originally let, the possibility of renewal was always contemplated.

The third form of lease very closely resembled the antichretic mortgage. The mortgagee was given the immediate use and enjoyment of the property. He did not have full title; but he had the enjoyment of the land, and could recoup himself from the fruits thereof. In this way, property was granted for a term of years in return for money loaned, and the creditor was put into possession and guaranteed against disturbance during his occupancy. At the end of the term he was obliged to surrender the land to the real owner, and he was not compensated for any improvements which he might have made. The distinction between this form of lease and a mortgage lay in the fact that the creditor did not obtain any right to sell or to convert to his own use the property mortgaged or pledged. It differed from an ordinary lease in that it was a means of satisfying a debt.

#### SECTION VI. — MORTGAGES AND PLEDGES

The antichretic mortgage of Egypt closely resembled that of Babylon. It was an exchange of uses. The borrower transferred the land to the lender, in return for a loan of money. The lender thereby acquired the use of the land; but he received no interest on his money, the use of the land being regarded as equivalent to interest. The lender could transfer his acquired rights to a third party. He could not sell the land, for he had no title of ownership; but he could dispose of his right to the enjoyment of the property.

This form of mortgage was in Egyptian law based less upon the idea of the fruits of land as equivalent to interest than upon the distinction between ownership and possession. The owner, in return for money lent, disposed of his right of possession. The lender acquired a possibly profitable investment, since if the debt was not repaid the land became his. The gain, however, would actually be only the slight difference between the value of possession



and the value of a perfect title. The Egyptian antichresis differed from the Babylonian chiefly in the necessity for foreclosure proceedings and the greater length of time during which possession by the mortgagee continued. It was by no means rare for the possession to descend from father to son; a family might retain for a century or more the right of redemption, while the right of occupation was vested in another family.

The conditions which led to an antichretic mortgage, often extending over an indefinite period of time, were in many respects different from those which caused its existence in a country where the term of mortgage was short. It has been suggested<sup>1</sup> that the relatively high wages and the scarcity of competing investments made an antichretic mortgage favorable to the small cultivator who was financially embarrassed and yet was unwilling to part with his ancestral property, the interest charge on the loan which was necessary to him being done away with by temporary cession of the land.

Articles were easily pledged as security, and the hypothecation of any of the four classes of goods was possible. Indeed, the Egyptians had many forms of pledge. There was the general pledge, or mortgage of all one's goods as security for a loan. This was first introduced in connection with marriage settlements, but it seems to have been extended to other forms of loan, or *quasi-loans*.<sup>2</sup> A son might promise a pension, or yearly allowance, to his mother and secure it to her by the fiction of a loan and by consequent mortgage of all his property. Again, there was the pledge of movables, which were deposited with the creditor as security and might on default of payment by the debtor become the property of the pledgee. Or an immovable might be retained and the title pledged, or the title retained and possession pledged, with provision for cession of title, thus: "I have given you my home, which is

<sup>1</sup> See Simcox, *Primitive Civilizations*, I, p. 185.

<sup>2</sup> Revillout, *op. cit.*, p. 193 ff.

in such a quarter, as security for that sum, until I have paid it to you at the date mentioned. If I do not pay you, you will have the right to compel me to give you without delay a writing for money [a deed] for my home, above named, in the month which follows the month named.”<sup>1</sup>

There were in the execution of a mortgage certain formalities, in respect to which it differed from a sale; but the same number of witnesses was required in both. The mortgagee did not, however, take the object, or its symbol, in his hand; and, simple as appears this distinction, it was fundamental in any primitive system of law, as is shown by comparison with that wonderful collation of ancient customs, the early Roman law. Unless the mortgage was antichretic, where there was an exchange of uses, there was no reason for the employment of this symbolic act. The mortgagee merely gained the right to obtain possession in default of certain promises being unfulfilled, but under no other condition. The conception of a mortgage, or pledge, without possession, was the contribution of Egypt to the common fund of legal theories of Europe, to which it passed by way of Greece. As hypotheca, it became known to the Romans, and resulted in the modern mortgage.

Among the many improvements in Egyptian law which have been attributed to Bocchoris, none seems to have been more rational or more surely founded on far-seeing political considerations than that which forbade the creditor to seize the body of his debtor in satisfaction for an unpaid debt. It is very remarkable that in a nation as eminently gifted in legal science as were the Romans, that was not perceived which was clearly seen by the Egyptians,<sup>2</sup> namely, that the person of the debtor was subject

<sup>1</sup> Revillout, *op. cit.*, p. 131.

<sup>2</sup> Cf. Diodorus, I, 79. On the authority of Diodorus consult Revillout, *Cours de Droit Égyptien*, p. 42: “*Aussi les témoignages de Diodore de Sicile en ce qui concerne les lois Égyptiennes, ont-ils tous été confirmés par l'étude des documents d'une certitude absolue, que nous possédons aujourd'hui.*”

to a claim superior to that of the creditor. It was that of the State, which might at any time require his services, ✓ in peace as an official or laborer, in war as a soldier. This law was probably borrowed by Solon, and is one of the few contributions of the law of Egypt to that of Greece. Diodorus, who mentions the law as prevailing among the Egyptians, remarks that it was certainly more reasonable than that which limited the right of execution for debt by prohibiting the taking of implements needed for husbandry, as the plough, and permitted the person of the debtor to be seized.

An Egyptian form of pledge of peculiar interest was that which pledged the body of the nearest deceased relative, and especially that of a father. In fact, it seems from the earliest times to have been almost a universal custom to make such guarantee of repayment.<sup>1</sup> The form of this pledge was the transfer of title to the ancestral tomb, not the removal of the specified mummy, unless there was default of payment. In this latter case, the mummy was removed by the creditor, and the tomb was closed against any interment by the debtor. The effect of such a pledge was evidently only moral. The delinquent debtor thus brought the utmost disgrace upon himself. By such a pledge, he was bound in honor to refund the borrowed money. It was a species of spiritual or religious sanction given to the loan, enforced by the sentiment of the community rather than by the law.

#### SECTION VII. — PARTNERSHIP

The commercial life of Egypt was not sufficiently developed to produce any law of partnership at all comparable with the Babylonian system. Trading adventures calling for a large amount of capital, which are the natural foundations of a system of partnership law, were entirely

<sup>1</sup> Cf. Diodorus, I, 93; Herodotus, II, 136.



unknown in Egypt. Foreign commerce was very limited; what little existed was carried on by the kings. Except in those articles of luxury which were brought by foreign merchants, the land found its own resources sufficient. At home, the interchange of agricultural produce and manufactures was equally restricted. No large manufactures were undertaken by private enterprise. Banking companies were unknown, and the need of them was hardly felt.

The nearest approach to partnership seems to have been in the form of a lease or contract between proprietors and tenants of the soil. The parties bound themselves to certain duties; one furnished capital, the other labor. But it may be said with truth that such a form of coöperation was an exception to the legal idea of obligations prevailing in Egypt, or indeed in any primitive civilization. A money loan was the type of obligation, and the antichretic and other forms of mortgage gave ample opportunity for the contraction of such obligations.

A second form of partnership was presented in the joint ownership by father, mother, and child of the family inheritance. In many juristic acts, such owners were obliged to act together in order to give validity to the transaction. But this was a partnership resulting merely from common interests in a piece of property, such as is often found in other cases when a person owns an undivided interest in a field. The original contract between husband and wife was of a different nature from the joint ownership by all members of the family. But this was too obviously a matter of domestic relations to be regarded as a partnership.

#### SECTION VIII. — DOMESTIC RELATIONS

Among the characteristics of ancient Egyptian life, few are more striking than that side of the domestic existence which is concerned with the tenderer emotions and affec-

tions. The records of Babylon contain no such tender references to the departed wife as do those of Egypt. The Hebrew traditions comprise divine commands to honor father and mother ; but nowhere do we find among them such praise of the virtue of filial piety as is found inscribed on the Egyptian tombs. The love and obedience rendered to his parents are set down as the highest praises of the deceased.

It is therefore not surprising that in Egypt the domestic relations assumed a degree of development far in advance of those of contemporary nations. The position of woman was high, and her freedom was respected. Although the older forms of marriage by purchase were retained, — just as among the Hebrews, the Babylonians, the Romans, and all other nations, early customs survived long after the reason for them had disappeared, — yet a woman was regarded as far more than a chattel. Her position was incomparably higher in the domestic economy than it was in early Rome or in Palestine. She was not, as at Rome, under tutelage, but was herself an integral factor in the composition of the family. The remnants of the so-called *Mutterrecht*, which in spite of vast social change had been retained, showed themselves in the custom of recording descent through the mother more frequently than through the father. Inheritance seems very frequently to have passed in the female line. This legal institution made the position of woman in many respects higher than that held by her in any other of the nations of antiquity, with the possible exception of China ; but in Egypt it was the wife, as the partner of the husband in the conduct of the family and co-proprietor with him, and not the husband's mother, who was honored.

Yet in spite of the very favorable position of women, there existed domestic customs which to modern notions seem reprehensible. Among these were polygamy and the incestuous union of brother with sister. The latter was

by no means confined to the royal family, as is generally thought. The reason which caused the marriage of the prince with his sister greatly resembled that which caused the marriage of the peasant with *his* sister: the inheritance was thereby preserved intact. This kind of marriage was extremely common in some parts of Egypt. The explanation of its existence and extension, so utterly different from and opposed to the customs of other lands, seems to lie in the retention of *Mutterrecht* after the establishment of a higher civilization than one in which that institution was natural and justifiable. It was a survival of a type which was out of harmony with the existing conditions.

Polygamy was permitted. But in all polygamous countries there exists a check upon that practice in the fact that the privilege of a plurality of wives is restricted to a few of the rich. There was in Egypt no trace of the Hebrew custom, whereby every female slave was legally the *quasi*-wife of her master. Again, polygamy was not infrequently prevented by the marriage contract, which gave the wife liberty to leave her husband should he bring a rival to her into the home. In the Egyptian method of disposing of the family property serious consequences might arise from such a contingency.

The act by which the marriage relation was established was peculiar. It consisted of two parts; or rather the taking of a wife seems to have been completed in two stages, by the second of which the relation created by the first became more binding and permanent. In the Roman plebeian marriage the woman was purchased from her father, or from whoever had over her the *patria potestas*. After a year of married life, the husband acquired over his wife the same authority as that resulting from the patrician form of marriage. The wife was regarded as a form of property, title to which was acquired by a year's *usucapio*. This is the nearest analogy to the Egyptian marriage;



but it differs fundamentally from that marriage. The Egyptian obtained his wife by purchase. In this he was in consonance with all nations of antiquity. The economic value of the daughter in the domestic circle rendered a payment for her services a natural act. The Egyptian marriage was further regulated by a contract between the parties to the marriage, of which contract the following may be taken as an illustration<sup>1</sup>:—

“Patma, son of Pchelchons, whose mother is Tahet, says to the woman Ta-outem, daughter of Relon, whose mother is Tautem: I have accepted thee for a wife, I have given thee one argenteus, in shekels five, one argenteus in all for thy woman's gift. I must give thee six oboli, their half is three, to-day six, by the month three, by the double month six, thirty-six for a year: equal to one argenteus and one-fifth, in shekels six, one argenteus and one-fifth in all for thy toilet during a year. . . . Thy pin [or pocket] money for one year is apart from thy toilet money, I must give it to thee each year, and it is thy right to exact the payment of thy toilet money and thy pin money which are to be placed to my account.<sup>2</sup> I must give it to thee. Thine eldest son, my eldest son, shall be the heir of all my property present and future.<sup>3</sup> I will establish thee as my wife.<sup>4</sup> In case I should despise thee, in case I should take another wife than thee,<sup>5</sup> I will

<sup>1</sup> Although this contract belongs to the latter years of Egyptian history, yet, as Revillout has pointed out, the law seems not to have changed in any fundamental principle for many centuries. Cf. Revillout, *Cours de Droit Égyptien*, p. 41 ff.

<sup>2</sup> This claim was by a legal fiction regarded as a loan, which the husband had received from and owed to the bride. See *ante*.

<sup>3</sup> This was an essential portion of every marriage contract, and undoubtedly played a prominent part in determining inheritance. See *ante*.

<sup>4</sup> By this clause, proprietary rights were conferred upon the wife, and she became mistress of the man's household.

<sup>5</sup> The lawfulness of so doing is here admitted; but the contract which provided a penalty in case the husband availed himself of his right must have done much to counteract the evil effects of what seems rather a loose form of union.

give thee twenty argenteus. . . . The whole of the property, which is mine, and which I shall possess, is security for all the above words, until I have accomplished them. The writings which the woman Tahet, daughter of Teos, my mother, has made to me, concerning one-half of the whole of the property which belonged to Pchelehons, son of Pana, my father, and the rest of the contracts coming from her, and which are in my hand, belong to thee, as well as the rights resulting from them. Son, daughter, coming from me, who shall annoy thee on this subject, shall give thee twenty argenteus.”<sup>1</sup>

As seen in the above specimen, the marriage contracts contained a provision for a penalty to be paid to the wife should her husband repudiate her. This might operate in either of two ways, either before or after “establishing a wife,” or the conversion of the preliminary informal and tentative union, which often preceded complete marriage, into the full union. The divorce proper was one which was subsequent to the establishment of the wife, and included the dismissal of the wife from the household, she taking with her that portion of the property which at her marriage she had brought to her husband.

The proprietary relations existing in Egypt between husband and wife find no parallel in the whole history of ancient law. In many cases the husband regularly divested himself of all his property, conveying it to his wife on the condition that out of it she should support him. In other cases the wife, if by the marriage contract she did not acquire full rights to the husband's property, was thereby given over such property a control which rendered the husband entirely incompetent to transfer it without her approval, but did not herself lose any right over the unlimited disposal of her own estate.<sup>2</sup> The literal endowment of the wife with all worldly goods, which so often

<sup>1</sup> *Records of the Past*, X, p. 75.

<sup>2</sup> Revillout, *Cours de Droit Egyptien*, p. 203.

occurred in Egypt, was due to the law of succession and the conception of the family as preserving the family inheritance. An essential feature of the more solemn and binding marriage act—the establishment of the wife—was the declaration that her eldest son was to be the eldest son (that is, the heir) of the husband. The man founded a home, or family, and this he did by providing for the succession of his estate through the mother. All sons were legitimate, and though born of some woman other than the lawful wife, would have legal claim to some part of the inheritance; but by the transfer of the property to the wife, inheritance was restricted to the issue of the marriage.

The underlying idea of this custom—which seems to have come into existence at a very early date, and probably became less frequently used as time went by—was the survival in Egypt of *Mutterrecht*. Among the results toward which this tended was undoubtedly a greater restriction upon divorce than arose from any other cause. The intimate connection between property rights and domestic relations made a divorce a much more serious matter in the Egyptian family than in the Hebrew. The custom also operated powerfully in restraining polygamy.

The child played a far more important part in the law of Egypt than in that of other nations of antiquity. The *patria potestas*, in any true sense of the term, did not exist in Egypt. In Babylon, it was not an unusual thing for a father to sell a son. Among the Hebrews, the same practice was not uncommon. A threefold sale was the legal fiction by which a Roman father emancipated his son. The cause for the more important position of the child in relation to the authority of the father, as it existed in Egypt, must be found first of all in the law, or custom, of inheritance through the mother. The contract of marriage, whereby the eldest son was established as the



heir, made it impossible for the father to disinherit such son or to cast him out of the family. His position was assured him by his mother's marriage, and the claim of the mother against the husband was enforceable by a process of law. It was therefore a legal right.

As has been said, a child was by law legitimate without reference to his maternity. This custom belonged to the system of inheritance which was grafted upon the older principle of inheritance through the mother. It was, however, possible to give children a higher status in the family by a marriage contract, or by establishing their mother as a wife, subsequent to their birth. Indeed, the formula which was used seems to point to the frequent existence of children by the less formal union.

A child could also be adopted. The grounds for such artificial relation were the same in Egypt as in Rome and India. Not only was there the reason of affection and sentiment, but there was the very practical reason of providing for the funeral rites, which duty by immemorial custom devolved upon the son and heir. In Egypt, as in the other countries named, there was the same desire to have the rites of ancestral worship maintained from year to year, and the cult of the dead was a powerful influence in many of the most important acts of daily life. The adoption, which was to remove from the departed spirit the stigma of not providing for the continuance of family rites, was effected, as in Babylon, by a contract of acceptance and renunciation. The form of contract gave the name of the natural parents and that of the man who was to be adopted. The consideration which he had received as the price of allowing himself to be adopted was also stated. He therein declared, in the Egyptian style of contract, which as far as possible recorded the words actually employed by the contracting parties: "I am thy son, and the children whom I shall beget. All that I possess, and all that I shall acquire are thine. Any one who

comes to thee to take me away from thee, saying, 'He is not thy son,' whosoever it be, father, mother, brother, sister, lord, lady, even the High Court of Justice, or I myself,—such an one shall give thee silver and corn, whatsoever thy heart shall please. And I shall still be thy son, and my children forevermore."

The child—whether born of a wife in full marriage, legitimated by completion of the marriage contract, or adopted—was an essential constituent of the family. Without him, the family did not attain its normal form. Not only were the gods arranged in groups of three—father, mother, and son—but that was considered a valuable maxim which enjoined a man to marry early and to cause his son to marry early and beget a son in his turn, that there might be due provision for the continuance of the family. But the son filled a more important place than that arising from ancestor worship. He had an essential part in connection with the proprietary relations of the members of the household. As the father often transferred his property to the wife, that it might descend to the son, so the father was the heir of the son. The triad was complete; the property of the family was established upon the normal basis.

In the absence of wills, the father often provided during his lifetime for the division of the family property. He sometimes held property in trust for his children, or conveyed it to them, retaining the usufruct. At times he even surrendered all his rights to the property and abdicated his authority as head of the family, in order that his son might occupy his place and provide for his support. In this way, the position of the child became extremely important, and there arose a state of things entirely different from that which prevailed at Rome. The transfer of property to the child, with or without retained usufruct, was not, however, the only form of proprietary relation among the members of the family. It was

merely one method of providing for inheritance. It was in many respects an advance upon the earlier mode of succession, which was in Egypt, as everywhere, intestate succession. It was a part of that legal evolution which finally produced the testament; but it was unable entirely to supplant the earlier forms of succession. In fact, there were not in Egypt those reasons for a departure from intestate succession which obtained in the law of Rome, since the father did not have absolute control of the family property. He was, as has been shown, seriously hampered in his control by the general mortgage which placed his property under the joint control of the wife. Furthermore, the children themselves had rights in the family property.

The children's share in the family property was an interest which could not be separated from the whole sum of interests in the estate. It was not the case in Egypt, as it was in India and elsewhere, that a son, who by birth acquired a legal right to a share in the paternal inheritance, could demand a division of the property. The interest of the children was limited to the right to share in the control of the property. It could not be taken from them without their consent. In order to alienate this right, it was necessary for all to consent, the eldest son acting as their representative.

The institution of the eldest son as the heir belonged to that stage of legal development which in the Roman Law was reached by the appointment of the heir, who was at once an heir and, in the modern sense, the executor or administrator of the estate. In Egypt also the whole estate passed to him, and as administrator he divided the property among his brothers and sisters. Just as he had acted, during the lifetime of his parents, as the representative of the children, so by the ordinary mode of succession he represented the children in receiving the estate, which he was bound to administer according to the in-



structions of his father, or, in the absence of such instructions, according to the law of the land. He could take a small fraction in addition to the share falling to him, as recompense for his labors and expenses in dividing the estate and performing the ceremonies incumbent upon him as the representative of his father.

The position of the daughter in the family is less clear than that of the son. It is, however, certain that inheritance could be conveyed through a daughter, and that the maternal grandfather often played a very prominent part in the succession — much more so than the paternal grandfather. Here again is seen the influence of *Mutterrecht*, which runs throughout Egyptian law; not as a consistently applied principle, but as a strongly modifying influence. In some deeds the eldest daughter figures as the representative of the other children, suggesting that the principle of primogeniture was not necessarily limited by sex in its application. Certain it is that women were often possessed of property in their own right.

#### SECTION IX. — THE FATE OF THE EGYPTIAN LEGAL SYSTEM

The history of Egyptian law ends with the Roman invasion and subjugation. A few customs and traditions, however, remained in force for many years thereafter. Some of these were adopted by surrounding nations and tribes, and thus attained a certain permanent existence in the world's history. But the domestic law was almost completely overthrown by Ptolemy Philopator, who placed the wife under the tutelage of the husband; and the introduction of the alien Roman system radically altered the whole structure of society. Egypt played no such part in universal Historical Jurisprudence as did Babylon and Rome. Her contributions to legal theory were not scattered abroad by the enterprise and daring of travelling merchants. Except for a comparatively short period, her

interests were centred upon her valley home, and the conditions of life on the banks of the Nile were so favorable that the natives did not travel far afield, either to win a livelihood or to investigate distant parts of the earth. No traditions of the past roused the Egyptians to achievement, and the race tranquilly ran its course. The overthrow of dynasties marked its chronology ; but the country remained practically unmoved. And when at last the race had finished its history, and its distinct existence was lost in the overthrow of the last of the Old World dynasties, its law perished with it. That law had not contained many points of universal applicability. The very conditions which had called it to life and preserved it with little alteration for so many centuries, dragged it down in their own fall, and with them it passed away, its usefulness outlived.

## CHAPTER III

### THE LAW OF PHœNICIA

THE development of private law depends upon the exigencies demanding such law. In primitive times, legal development never went beyond the actual conditions of the day. The origin of law is always to be found in custom, rather than in the codes attributed to more or less mythological lawgivers, and herein is to be found the explanation of the surprising anticipation in ancient codes of modern legal methods and modes of thought. The custom grew before the law was formulated, and became law through enforcement at the hands of some authority capable, either through force or respect, of executing its decisions. This is the history of almost all law, certainly of all the most important private law of antiquity, and this method of development continues to exist. Mercantile customs are constantly being embodied in statutes, or are enforced by legal tribunals. It was in this manner that Babylonian law attained its surprising elaboration and comprehensiveness.

The presence in one State of a workable system of law adapted to a complex social and economic life, will have no small influence upon neighboring States. This will be especially the case with States which are brought into close and constant contact with the more developed community. It would have been impossible for the merchants of Phœnicia to have carried on their large trade with Babylon without adopting the Babylonian system. The Babylonians would treat the Phœnicians either as barbarians — in which case the former would recognize no law as binding, finding right in might — or as commercial



equals, when the same legal principles would govern both parties. The former hypothesis is inconceivable, for the Phœnicians proved themselves capable of holding their own in business transactions with any mercantile nation of antiquity; the latter hypothesis is supported by abundant evidence. Thus the Babylonian law obtained hold in Phœnicia, and, as the law of the latter country, became dominant in the countries bordering the Mediterranean.

Proof that the Phœnicians and Babylonians had a common commercial law is to be found first of all in the constant intercourse of trade between Phœnicia and the Euphrates valley. Of this the trading colonies between the Mediterranean and Mesopotamia furnish evidence of no little weight. Among these was Laish, afterward known as Dan, situated on the great route between the Euphrates and the sea-coast. Its importance as a trade centre as late as 900 B.C. is shown by its position as the northern sanctuary of the Israelites. Other cities were Hamath — which in the time of David had become an independent kingdom — and Eddana, of which it is only known that it was on the Euphrates. Thapsacus appears to have been founded by the Phœnicians; their colonies extended even as far as the Persian Gulf.<sup>1</sup>

Throughout Western Asia the influence of the Babylonian law is proved by a contract system very closely resembling, if not identical with, that ancient system of mercantile law. Thus, numerous contract tablets in cuneiform characters have been found not far from Kaisariyeh, in Cappadocia; these tablets seem to be of a date as early as 1500 B.C.<sup>2</sup> The Phœnicians are also found in Assyria<sup>3</sup>

<sup>1</sup> Cf. Strabo, XVI, 3, 4. Cf. Movers, *Die Phönizier*, Bonn, 1841-56, Vol. II, Pt. III, pp. 236-271.

<sup>2</sup> For translations of fourteen of these tablets see *Records of the Past*, New Series, Vol. VI, p. 124 ff.

<sup>3</sup> It should be borne in mind that the Babylonian culture was received by the Assyrians as a whole, and the conditions of life in the two kingdoms varied but little.

taking part in business transactions and witnessing deeds and contracts.<sup>1</sup>

The third point to be mentioned is the strong Babylonian influence which is perceptible in Phœnician art, culture, and even religion.<sup>2</sup> This seems to have been the fact even before the Phœnicians migrated to Western Palestine, although it cannot be positively asserted that they migrated from the immediate neighborhood of the Persian Gulf. Evidence is being constantly discovered that the Phœnician deities, as well as their names and rites and ceremonies, were adopted from the Assyrian-Babylonian cults. An example is found in the god Dagon, who in representation and name is very similar to the Babylonian Dagan.<sup>3</sup>

We have, however, no direct knowledge of Phœnician law. There is no positive information concerning their domestic customs or relations. Only in the law of inheritance does there seem to exist a clew, in the fact that children were often named after a grandparent, and they were regarded as a sort of pledge of personal continuation of life after death, as was the case among the Hebrews and many other races. Marriages between brother and sister were permitted, but probably occurred solely when a legal right was inheritable only in the female line.

The Phœnicians founded extensive commercial settlements throughout the West. At a very early date there were flourishing colonies at Cyprus, Rhodes, and Crete, and on the coasts of Greece, Italy, Sicily, Malta, Africa, and even Spain. There was a Phœnician colony far inland, at Memphis, in very early times. The object of these

<sup>1</sup> Cf. the Assyrian Private Contract Tablets in *Records of the Past*, Series I, Vol. I, p. 138 f., partly in Assyrian, partly in Phœnician; the deed of the sale of Israelites, 709 B.C., translated by Opert in *Records of the Past*, Series I, Vol. VII, p. 115; also, another deed of sale of a house belonging to a Phœnician, *ibid.*, p. 113.

<sup>2</sup> Cf. Pietschmann, *Geschichte des Phœnizier*, Berlin, 1889, p. 143.

<sup>3</sup> Cf. Pietschmann, *op. cit.*, p. 145.

colonies was principally trade, and they were regarded as of the highest importance. The enterprise of the Phœnicians is well shown in the treaty between Rome and Carthage, in which the former stipulated that Carthage should not establish a fortified port in Latium—a clause which would hardly have been inserted had not such a thing been in contemplation. The Phœnician traders were in the habit of founding these settlements with a view to protection against native attacks. These traders were in many cases little else than invaders, with no respect for national rights. Their course resembled that taken in modern times by civilized nations when dealing with semi-barbarians. A series of settlements—in all probability made with the approval and aid of the mother country—finally stretched from one end of the Mediterranean to the other, and the navigator who undertook the long voyage to Spain, or the more perilous one to Britain, could find on his course harbors where he might obtain refuge, supplies, or repairs.

The organization of trade was in the hands of private individuals, by whose enterprise the work was carried on. Yet the State looked upon commerce as the basis of its wealth and strength, though retail trade was despised.<sup>1</sup> Every advantage was given to the merchant in his foreign undertakings. Wherever he might be, he was constructively present in Phœnicia, and settlement in the more distant ports deprived him of no rights. He lived under the same law as at Tyre and Sidon, and he recognized his connection with the mother city—from which he was often absent for years, if not for a lifetime—by sending offerings to her temples.

The voyages undertaken by the Phœnician merchants were long. It was consequently necessary that the ships should be large, so that they might contain sufficient cargo

<sup>1</sup> The king and nobility were certainly engaged in commercial ventures. Cf. 1 Kings ix. 27.



to pay the expenses of the voyage. The most frequent objects of trade were precious metals<sup>1</sup> and slaves.<sup>2</sup> Phœnicia was, in fact, the great slave-market of the world. By visiting many ports, her traders were enabled to collect large numbers of slaves. These were generally prisoners taken in war, or possibly kidnapped, and were sold to the surrounding countries. The merchants also dealt in the products of the skilful artisans and manufacturers of Babylon, the rich fabrics of the loom, couches inlaid with gold and ivory, spices and perfumes;<sup>3</sup> for Phœnicia was the distributing centre for all the products of the East. So exclusively did the inhabitants of Tyre and Sidon monopolize the carrying trade and the commerce of the ancient world that at that time the name Phœnician was practically synonymous with that of merchant.

The demands of a commerce as extensive as that of the Phœnicians created a system of business law. Indeed, such a commerce was possible only through the existence of such a law. This law was inherited in bulk from Babylonia and Assyria.

The Phœnician merchants dealt largely in money and precious metals. Thus they were bankers and money-lenders; among the Greeks they were famous in this capacity. Nearly all the silver which was in circulation, and which was the common coin, was the product of the Phœnician mines. As the silversmiths of the Middle Ages, the Phœnician merchants were not only dealers in silver, but bankers as well; not merely as money-changers, but as receivers of money for which they paid interest and which they invested in commercial enterprises. Indeed, this form of transaction was anciently regarded as the invention of the Phœnicians. But the idea of interest

<sup>1</sup> Cf. Ezekiel xxviii. 3, 4.

<sup>2</sup> Cf. Movers, *op. cit.* II, Pt. III, pp. 27-106, for an account of the articles of commerce.

<sup>3</sup> Cf. Plautus, *Stich.* II, 244 ff.

had earlier occurred to the Babylonians. Indeed, this idea naturally arises in a country where there is any great commercial activity. In a land of patriarchal simplicity, where the inhabitants looked upon one another as brethren, the conception of interest might seem abhorrent and be very slow to gain foothold. But the Phœnicians were traders; they had no such scruples.

In their voyages — often made with intent of speculation — the desirability of obtaining loans upon the security of the vessel and cargo would be a natural idea, and the peculiarities of such loans would at once become apparent. When a man had invested his all in a vessel and cargo, the only security which he could offer would be the vessel and her freight. This would be less valuable as a security than real property, or even than any form of property that could be deposited with the lender. The Phœnicians therefore adopted the methods of the Babylonians as to sea-loans, but they carried them further, as with them marine commerce was a necessary outlet for their activities.<sup>1</sup>

There are, however, two features in Phœnician commercial life which are of especial importance as illustrative of the creation of law by the demands of practical life without the intervention of positive enactment. The first of these concerned the system whereby the trader found recognition and welcome in foreign ports. It is a commonplace that in the majority of ancient States a stranger had no rights. In some respects, the case of the Phœnician merchant was worse than that of others. He was often suspected of being addicted to fraud and knavery

<sup>1</sup> Further treatment of this subject will be found in the chapter on Greece, as it is from that country that we learn the later developments of Phœnician mercantile law. It is interesting to note that at Rome bottomry was looked upon with abhorrence, and that it was also forbidden at Rhodes. In the former place this was probably due to the fact that the people were not mercantile by nature; in the latter it may have been due to some peculiar local circumstance or occurrence.

of every kind, and it was therefore especially necessary that his property and life should be secured from attack. In some places he was from the beginning protected by treaty or contract with the authorities,<sup>1</sup> but in the majority of cases friendly relations were only gradually acquired. The custom of *hospitium*, by which a stranger attached himself to a resident, sufficed as long as there were but few Phœnicians at any one place, or there was little commerce with that place. We learn from Plautus the method in which this *hospitium* was created.<sup>2</sup> According to the dramatist, a Greek citizen, Antidamas, had made a compact of *hospitium* with a citizen of Carthage, Hanno by name. As an evidence of friendship they prepared a tablet of clay, not unlike a Babylonian contract tablet. This was broken in two, each man retaining half. These *tessera hospitalis*<sup>3</sup> would exactly fit together and thus prove that the holder was the person with whom the compact of *hospitium* had been made. They were carefully preserved by the respective families of the parties. In course of time Hanno had occasion to visit his friend and protector, and took with him his portion of the tablet. He found Antidamas dead, but he was recognized by the heirs, who had preserved their portion of the tablet. A number of tablets similar to this have been found, some with Greek and others with Latin text. They recorded covenants of hospitality between Phœnicians and Greeks and Romans.

But the Phœnicians carried one step further the protection of their citizens in foreign places. This was done by a method closely resembling the modern system of foreign consuls. The authorities of the various Phœnician city-states were accustomed to appoint a citizen of each important foreign city as *proxenos*; he was the rep-

<sup>1</sup> Cf. Movers, *l.c.*, p. 121.

<sup>2</sup> Plautus, *Pœnulus*, V, 1, 8, 15; 2, 8 ff.

<sup>3</sup> Plautus calls these *tessera hospitalis* "chirs," i.e. a fragment. The Greeks called them *symbolon*, because they were to be put together.



representative and attorney of the citizens of the country which appointed him, as long as these remained within the territory for which he was appointed. These *proxeni* for the various Phœnician cities were to be found in the chief towns of Greece, and are mentioned in many inscriptions.<sup>1</sup>

When a large number of Phœnician citizens were resident in a foreign city, it was customary for them to unite in corporations, guilds, or companies. These differed from the modern companies in that they were not branches of a home company, but made up of those merchants who happened to be resident in the foreign city. These companies were not indiscriminately composed of all Phœnicians resident in the city; each was made up of those who originally came from the same city or state. Thus at Puteoli there were two corporations, one of the merchants from Tyre, the other of those from Berytus. The citizens of Sidon enjoyed at Athens privileges peculiar to their corporation, which privileges were not extended to corporations from other cities. This close union was doubtless due to the relation in which each corporation stood to the mother city. The corporation remained under the protection of the city of which its members were citizens, and under its oversight as well. An interesting illustration of the relation of the corporation to the mother city is given in an inscription discovered at Puteoli and now in the Capitoline Museum. The union, or corporation, of Tyrian merchants at Puteoli had once been of considerable size and had possessed public buildings and temples. In time it became of less importance, and was unable to pay the tax demanded for protection and to maintain religious services. This state of things was represented to the Senate of Tyre, and the flourishing condition of the Tyrian corporation at Rome, which had formerly united in maintaining that at Puteoli, was

<sup>1</sup> Cf. Movers, *l.c.*, 123.

mentioned. The representative of the needy corporation showed the facts of the case, and the matter was decided in favor of Puteoli. "The men of Puteoli have right. It has always been so, and it shall still be so. This is for the city's best. Let the ancient ordinance be maintained."

It would appear from this that the corporations were connected with the mother city in much the same manner as the colonies, and that from early times some system was in use whereby the principal corporations — probably those in the chief cities — aided the lesser, which were perhaps branches, situated in the smaller towns and ports.

## CHAPTER IV

### THE LAW OF ISRAEL

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#### SECTION I. — HISTORY AND SOURCES

THE legal system of Israel did not stand in the forefront of the great systems of the ancient world. Its development was not in advance of that of the race among which it existed. That race was not advanced in culture beyond many which have long since been forgotten, and in force of arms it was among the feeblest of the nations of Western Asia. The political importance which has been attributed to it is the product of reverence and imagination. But the importance of the legal system of Israel is due to its intimate connection with the national religion and its relation to the Christian religion. In this way its law has exerted an influence apparently out of proportion to its intrinsic merits when viewed simply as a system of jurisprudence.

The legal system of Israel is interesting and valuable for other reasons than its connection with a religion which has in one form become world-wide. It is the law of a nation which for many hundred years preserved its records with a fulness unequalled by any of its contemporaries. That nation began its existence as a horde of nomads fleeing from Egypt, and ended as a province of the Roman Empire. During this long period there are ample sources for the most detailed history, and the historical works are abundantly illuminated by the contemporaneous literature which has been preserved. The law developed from its earliest form, adapted to the life of the nomad, into the law adapted to dwellers in towns.



The law of Israel is contained in the Pentateuch, more particularly in the second, third, and fourth books, attributed to Moses. But critical examination of these books reveals the fact that there are many laws on the same subject which can be connected and reconciled to each other only upon the supposition that they belong to different stages in the legal development of the nation. The product of the investigations which have been made into the order in which these laws were promulgated or came into use are among the surest results of literary analysis, in which the critical methods have been most brilliantly employed in tracing the development of law.<sup>1</sup>

The key to the modern criticism of the Pentateuch, and with it to the understanding of the history of Israel as a whole, was found in the presence of duplicate narratives in the historical portions. On careful examination, it was seen that linguistic differences marked those duplicate narratives. This clew was followed up, and it was soon found that the phenomenon, which was very evident in Genesis, extended throughout the Pentateuch. In this way the laws were separated into three general groups, roughly corresponding to tendencies at three different periods in the history of the nation. These were an early primitive type of religion, a revolutionary type as shown in the reformation under Josiah, — with which revolution Deuteronomy has been generally connected, — and an extreme sacerdotalism, which has been connected with the period immediately following that of Ezra. The general

<sup>1</sup> For the working out of the ritual law in its history and its bearing upon the history of Israel, see Wellhausen, *Prolegomena to the History of Israel* (English edition), and his article *Pentateuch* in the *Encyclopædia Britannica*. Kuenen, *History of the Religion of Israel*, translated in the Theological Translation Fund Library; Robertson Smith, *The Old Testament in the Jewish Church*; Canon Driver, *Introduction to the Literature of the Old Testament*, and Kuenen, the *Hexateuch*, should also be consulted on the critical position assumed in the text. The best history of Israel is by B. Stade, in Oncken's great series.

method by which these divisions have been dated and arranged is first of all linguistic and literary, but is also historical. In this last method, the touchstone is afforded by the historical books, especially Judges, Samuel, and Kings, and by the books of the prophets. The investigations have been almost entirely in connection with laws of worship. At the same time, the laws of property and domestic relations, embedded in documents and placed as to date, origin, and purpose, according to religious law, are found to stand in an order of sequence in strict conformity with historical probability and the known conditions of society in Palestine.

As in the case of all ancient nations, the beginnings of the law of Israel may be traced to tribal customs. As in all primitive peoples, so in Israel, may be seen the habit of attributing the origin of a custom to early ancestors acting under divine instruction. Herein, too, may be found that extraordinary unity of feeling which made it possible for a race comparatively low in the scale of civilization to preserve domestic peace for relatively long periods. Another origin of much of the law of Israel is to be found in the connection between the religion of the people and the customs connected with the actual affairs of life. In addition to the authority of certain heads of families, there were judges, who were also priests. Therefore there was always present a judge, one who could speak with authority, though it must not be inferred from this that these priestly judges were independent of the customary law of the tribe or nation. They for the most part interpreted the customary law, and here, as everywhere, these interpretations tended to mould and develop the law. In this way it became exceedingly complex, and at the same time better adapted to the advancing culture of the nation.

In Israel, as among other primitive tribes, the criminal law was not at first distinguished from the private law.

There was not the clear conception of the State as an injured party by any act of violence. Every wrong or offence done a neighbor was a civil injury, and was treated as such. Revenge is everywhere found as the motive of the law; revenge by which every injury was visited in kind upon the offender. It was "an eye for an eye, and a tooth for a tooth."<sup>1</sup> In cases where no literal fulfilment of this principle was possible, a money fine was allowed. It was at this point that the higher forms of law began to develop. The fine could be looked upon in two lights: as compensation to the injured party, or as a punishment.

The distinction between the criminal and the civil law was brought about by the influence of religious ideas and the conception of the solidarity of the nation. The nation regarded itself as the especial favorite of the tribal or national God. This God was, at least in the early and middle periods of the nation, worshipped not as a universal but as a local God, to whom the Israelites owed allegiance. Certain acts were regarded as offensive to the Deity, apart from any immediate injury to the individual or nation. Such acts included not only failure to comply with ritual observances and distinctions of clean and unclean meats, but a vast number of analogous actions. Such were acts of sexual impurity, especially those in which the element of wrong done to another was absent. These cases are merely typical of many others. The nation was defiled by them; its relation to Jehovah was altered. He no longer regarded it with favor. It was, therefore, necessary to protect the nation from the effects of wrongdoing. This thought was fundamental to much of the teaching of the prophets. It was powerfully employed by them in their attempts to inculcate higher ethical conceptions. When the offence could be brought into connection with the general welfare, the private revenge or the claim to compensation would be either prohibited

<sup>1</sup> Cf. Ex. xxi. 22-25.



or greatly curtailed. As a consequence of a more strictly juridical conception, the judicial system became more and more prominent. The money fine, or damages paid to the injured party, was carefully regulated by the courts, and the customary amounts were recorded as a part of the fundamental law of the nation. But the payment of damages did not produce a distinction between the criminal and civil law; it rather tended to perpetuate the confusion. The distinction, as had been said, was due to the religious element.

The great codes of the law were made up at various times. The first great code is the so-called "Book of the Covenant," found in Exodus, chapters xx. 22-xxiii. 19. Although the date of this portion of the Pentateuch is late, being not earlier than the eighth century B.C., the principles therein contained are very much older, and probably are attributable to the earliest period of the occupation of Palestine. In the condition in which this code appears in the book of Exodus, there is no discrimination between ritual offences, sins against Jehovah, and offences against men. The contents of the code, although not a little confused, evidently relate to a very simple form of society. The matters treated of are such as would often arise in connection with agriculture and grazing. The legal conception at its basis is the *lex talionis*.

The second great code in the order of time is the Deuteronomic Code, which is practically co-extensive with the twelfth to the twenty-sixth chapters of the book of Deuteronomy. This code makes its first appearance in history during the reign of King Josiah,<sup>1</sup> although it was probably compiled some time before. Its position in the course of the legal history of Israel is midway between the "Book of the Covenant" and the "Priestly Code." In many respects, it takes its stand upon the earlier compilation; but it was composed with a definite purpose of bringing

<sup>1</sup> 2 Kings xxii. 8 *et seq.*

about a revolution or reform in the religion of Israel. This is shown by the constant emphasis of the new law that the central sanctuary was the only lawful place of worship. Combined with this new element were, naturally enough, various amendments of the older law, tending to the restriction of the *lex talionis*. The spirit of the book, furthermore, is ethical rather than legal, and throughout is shown the influence of the prophetic work. Originally, it was undoubtedly a private compilation, or the sketch of an ideal Israel as it appeared to some pious Israelite. But it was made authoritative by the action of King Josiah, who acknowledged its divine authority and enforced its provisions. In the subsequent redactions to which it was subjected it was provided with an elaborate historical setting.

✓ The third code of law is the Priestly Code, which is found in the last portions of Exodus, and in Leviticus and Numbers. A striking characteristic of this code is that much of the law is given in connection with historical events which explain its origin. It is a legal work in historic form. In the compilation of the Pentateuch, it has, accordingly, not been kept together. But it has comparatively little to do with the history of law and jurisprudence. It is almost entirely concerned with the cultus, and assumes the existence of a well-developed legal system, although it carefully maintains the constant reference to circumstances supposed to be peculiar to the desert life of the Israelites. The date of this code is very late, probably subsequent to the return of the Jewish captives from Babylon.

In addition to these three codes, there are portions of the Pentateuch which evidently belong to varying periods in the history of Israel. Their dates, however, cannot be accurately ascertained. In the numerous documents which make up the first six books of the Bible, many very early laws have been retained; and it is possible that in

the "Book of the Covenant," and in Deuteronomy as well, there are laws which antedate these codes by centuries. When the provisions of the earlier and later codes are conflicting, it will be found that the differences in the law are due to a development which agrees with the order of the ascertained dates of the various codes, and also with historical probability.

## SECTION II. — THE JUDICIAL SYSTEM

The judicial system of nomadic tribes is much the same in all ages. The father, as head of the family, has absolute authority over the members of his family. But when nomads settled in a land and became for the most part agriculturists, the conditions of life demanded a more complicated system. The paternal authority would remain; but it would be subject to certain limitations and changes. The place of judge of a village would be held either by an individual, who might be regarded as the father of the village, or by a council of elders. Both systems were represented in Israel.

Another modification which was brought about by settlement in Palestine, as well as by the growth of the nation, was hardly less important than the establishment of judges and elders. This was the power of the judge or council of elders to enforce a judicial decision. The decision of these judges was regarded as that of the whole community, and the community took part in the execution of the sentence.<sup>1</sup> The province of the judge had formerly been merely to decide the merits of the case; now, as the representative of the whole community, he could punish—though in the case of murder, as stated in Deut. xix. 12, the execution was left to the "Avenger of Blood."

According to the primitive constitution, the courts were to be found in every city or village, and were

<sup>1</sup> Deut. xvii. 7.



composed of the old men of the place. They held their sittings in the gate of the town, as the place of easiest and most frequent access. The authority of the elders, or court, of the larger places very probably extended to the smaller places. But the king acted as a superior court. His chief function was the administration of justice. Those who were not satisfied with the decision of the inferior court could appeal to the king. It was the tendency to carry cases directly to him. This would naturally first happen in the more important or difficult matters;<sup>1</sup> but the practice extended to cases of less moment.

The monarchical organization tended to the centralization of the legal and judicial system. When the king was regarded as a court which was superior to the local court of the village elders, the deputy of the king, appointed to hear particular cases,<sup>2</sup> would be regarded as superior to the local magistrates, who derived their authority only from the community. The struggle between the two systems—a struggle which has its analogies in the history of all nations—is illustrated in the Deuteronomic Code, the bent of which is centralization.

The statement of the later historians<sup>3</sup> that Jehoshaphat set judges over the cities throughout the land probably rested upon the actual extension of the royal judicial system. But the hierarchical bias of the author of Chronicles has so colored the narrative as to make it impossible to ascertain the exact historical truth. The books of Chronicles belong to the latest period of Jewish national history, and they attempt to reconstruct the history and institutions of Judah according to the Priestly Code in much the same manner that the books of Kings attempt to reconstruct these facts according to the Deuteronomic Code.

The legal procedure was very simple. The plaintiff

<sup>1</sup> Deut. xvii. 9.

<sup>2</sup> Cf. 2 Sam. xv. 2 *et seq.*

<sup>3</sup> 2 Chronicles xix. 4-11.

and defendant appeared before the judges sitting in the gate of the city, and the complaint was duly made. Except in peculiar cases, there seems in the early ages to have been no prosecution on the part of the State. If the plaintiff, avoiding legal procedure, attempted to avenge himself, it was a matter which concerned him alone, though the demands of communal life would oppose such a proceeding.

The method of proof which was employed in the courts was for the most part that by means of witnesses. A father had the right of the death penalty over his son without producing witnesses, though according to the Deuteronomic Code<sup>1</sup> he was obliged to lay the accusation before the court of the elders. Two witnesses were required to prove the commission of any crime involving capital punishment. At the mouth of one witness a man might not be put to death.<sup>2</sup> The Old Testament contains no law as to the competency of witnesses, but Josephus<sup>3</sup> says that women and slaves might not testify. This may have been true of an earlier period as well. But the position of a slave, as will be seen, was by no means such as to warrant the exclusion of his testimony. Among the rules as to the examination of witnesses and the punishment for false witness was the following: "The judges shall make diligent inquisition: and behold, if the witness be a false witness, and hath testified falsely against his brother, then shall ye do unto him as he had thought to do unto his brother."<sup>4</sup>

In addition to proof by witnesses, other forms were employed; as for instance in those cases whose nature precluded the possibility of witnesses, or when for any sufficient reason no testimony was obtainable. Thus, "If a man deliver unto his neighbor an ass, or an ox, or a sheep, or any beast to keep; and it die, or be hurt, or

<sup>1</sup> Deut. xxi. 18 *et seq.*

<sup>2</sup> Deut. xvii. 6.

<sup>3</sup> *Antiquities*, iv. 219.

<sup>4</sup> Deut. xix. 16 *et seq.*

driven away, no man seeing it; the oath of the Lord shall be between them both, whether he hath not put his hand unto his neighbor's goods; and the owner thereof shall accept it, and he shall not make restitution."<sup>1</sup> A reference to the earlier custom lies at the basis of the "bitter water of jealousy," described in Numbers v. 11-31. This custom was an ordeal. It has, however, left little or no trace upon the judicial system of the ten historical books.

### SECTION III. — DOMESTIC RELATIONS

The family is the foundation of the jurisprudence of Israel. In this respect the system is more primitive in type than those of Babylon and Egypt. The nation regarded itself as one large family. The tribes were families descended from the twelve sons of Jacob. The genealogies of the members of the various tribes were preserved with the utmost care. They were the foundation of all claims to land, and of all right to take part in the religious ceremonies. In short, the whole tendency of Hebrew law was the perpetuation of family in its various divisions, the nation, the tribe, the *gens*, the individual family.

In the earliest law of Arabia *Mutterrecht*<sup>2</sup> prevailed. The same custom might have had a place in the earliest days of Israel. Indeed, there are a few traces of it,<sup>3</sup> or at least there are expressions in the writings which can be most easily explained as references to such a custom. But as an institution in the settled life of Israel, it had disappeared before the beginning of the historical era. The law of inheritance which took its place was diametrically opposed to it. Polygamy was customary. There was no distinction made between legitimate and

<sup>1</sup> Ex. xxii. 10 *et seq.*

<sup>2</sup> See W. Robertson Smith, *Kinship and Marriage in Early Arabia*, Cambridge, 1885.

<sup>3</sup> Cf. Gen. xxi. 10 and xxx. 3.



illegitimate children. As long as the father of the house was the father of the child, the position of the mother in the household was immaterial. A wife who was barren was glad to have her personal slave bear children to her husband. The wife might thus, by a sort of fiction, have some of the honor of motherhood, since in such cases the children were regarded as children of the wife. In this way she freed herself from the reproach of sterility, which was regarded as a curse from Heaven. In this connection it should be noticed that although adultery was regarded as a crime of the first magnitude, there was no adultery except in cases in which there might be spurious issue. The act was not adulterous unless the woman with whom it was committed was married. The offence of adultery consisted in the invasion of another man's rights in his wife. The woman had no corresponding rights in her husband which could be violated. This was a natural result of polygamy, and was intimately connected with the above-mentioned idea of legitimacy.

So far removed from *Mutterrecht* were the ideas of the Israelites that, according to the law of Levirate marriage, the brother of a man who died childless married the widow. If there were no brother, the next male relative took the widow to wife. The eldest son by this marriage was looked upon as the son of the dead man, and the name and family of the latter were in this way continued.

The family, under the authority of the father, was the unit of society in Israel. Every member of that family contributed to its wealth and strength. Its importance, however, was less dependent upon wealth than upon numbers. Therefore the father did not leave to chance the matter of his sons marrying and raising families. Not only was it the ambition of every young Israelite to found a family, but it was to the interest of the father to provide a suitable wife for his son. Furthermore, the daughter-in-law was a distinct gain as another working member

in the household, while her marriage was a corresponding loss to her own family. Marriage was therefore founded upon purchase. A girl was the property of her father, and was sold by him to her husband. The payment, the "mohar," should be carefully distinguished from the personal gifts of the bridegroom to the bride, called the "mattan." The "mohar" was paid in money or in service. The amount of money was fixed by law at fifty shekels of silver;<sup>1</sup> but as no man was compelled to give his daughter in marriage, the sum actually paid was often greater. But when paid in service the amount was purely arbitrary. Thus, Jacob served seven years for each of his wives. Othniel won Achsa, the daughter of Caleb, by taking Kirjath-Sepher. Chiefs frequently offered a daughter in marriage to a successful warrior.

An illustration of this conception of the position of a woman is to be found in the law in regard to seduction and rape. If the seduced maiden was not betrothed, the money fine was the "mohar," or price, paid to her father.<sup>2</sup> If the maiden was betrothed, the fine was paid to the man to whom she was betrothed. Upon payment of the "mohar," the right to the maiden passed to the man to whom she was betrothed. Although no marriage had been consummated, unfaithfulness was punished by death, unless it was evident that the betrothed maiden was violated under circumstances which precluded the possibility of obtaining help.<sup>3</sup>

Although the wife was the property of her husband, she was in a higher position than that of a slave. Her value as expressed by her price was fifty shekels; the legal valuation of a slave killed by an ox<sup>4</sup> was but thirty

<sup>1</sup> Deut. xxii. 29.

<sup>2</sup> Note that the price was not paid to the bride, or to the bride's father for her benefit, but to the father as his own right, as equivalent for his relinquishment of right of property in the maiden.

<sup>3</sup> Deut. xxii. 22-29.

<sup>4</sup> Ex. xxi. 32.

shekels. That is to say, the owner of the slave could recover only that amount of damages; the father or betrothed of the seduced or ravished maiden could claim the former sum. The wife, indeed, had no property except her personal slave, or lady's maid. But she could not be sold as could a slave. She could, however, be divorced for any reason deemed sufficient by her husband. In this case, she returned to her own family; but the husband could not demand return of the price which he had paid. A divorced woman could become the wife of another man, and the bill of divorcement was a release of the right of her first husband to her person. The woman, however, had no right to put away her husband. He could not commit adultery against her. Although the wives belonging to a man were sometimes—in strict accordance with the theory of the law—a portion of his estate after his decease, yet it was not unusual for a widow to return to her own family, or even to marry again.

In the matter of the degrees of consanguinity and affinity within which marriages might not be contracted, the law of Israel is of the first importance in its connection with European law. There was a natural desire to contract marriage with members of the same family, in order to keep the inheritance in its hands and to strengthen its ties by closer union. Against marriage of those too closely related, the Deuteronomic law<sup>1</sup> contains prohibitions. The prohibited cases were those of marriage with the wife of the father,—not only the mother, but any member of the father's harem,—with the whole or half sister, and with the mother-in-law. The marriage of father and daughter, or of mother and son, was from the first forbidden by custom. The enactment of the Deuteronomic Code was an innovation. In the time of the patriarchs, marriage with a half sister was tolerated, and even in the time of David it did not give offence.<sup>2</sup> Like all other

<sup>1</sup> Deut. xxii. 30; xxvii. 20, 23.

<sup>2</sup> 2 Sam. xiii. 13.



property, during the early period, the wives of the father probably descended to the sons; this was certainly the case in respect to concubines.<sup>1</sup> The Priestly Code extended the list of forbidden degrees beyond that given in Deuteronomy. Thus, marriage is forbidden with the mother and the wife of the father, the sister and half sister, the grandchild, the aunt, paternal or maternal, the wife of the paternal uncle, the mother-in-law, the daughter-in-law, the brother's wife, and the wife's sister during the lifetime of the wife. That this was a comparatively modern law is shown by the fact that Jacob had two sisters as wives at the same time. The parents of Moses were nephew and aunt.

As was usual in antiquity, the children were under the absolute authority of the head of the family, the father, who was authorized even to put a disobedient or unfilial son to death. This right was to some extent limited by later law. By the Deuteronomic Code, the father was obliged to bring his worthless son before the elders.<sup>2</sup> The father's accusation was heard; no further investigation was made. Then the populace stoned to death the offending son. The right of the father to compel the marriage of his daughter was unlimited, and he might even sell her as a slave, but only to an Israelite.<sup>3</sup>

The slaves played an important part in the households of the Israelites, and their status was carefully regulated by law. There were two classes of slaves, Hebrew and foreign, and there were different laws for both. Slavery in Israel was an economic necessity, and the position of the slave differed little from that of a member of the family. The head of the family had over his slave no more authority than over the rest of the household. In some respects, the slave held a higher position than the

<sup>1</sup> Cf. 2 Sam. xvi. 21 *et seq.*; 1 Kings ii. 13 *et seq.*

<sup>2</sup> Deut. xxi. 18 *et seq.*

<sup>3</sup> Ex. xxi. 7 *et seq.*

hired servant, who was not a member of the family. According to the "Book of the Covenant" and the Deuteronomic Code, a Hebrew slave could not be held against his will more than six years. If the slave married during his bondage, his wife and children did not become free upon his manumission in the seventh year;<sup>1</sup> in other words, the children of the bondwoman followed the status of their mother, and remained with her master as his property; they did not rank as the children of the manumitted father. The ground for this custom seems to be that in almost every case the wife given to a slave was herself a foreign slave. The Hebrew female slave was the concubine of the master or of his son.<sup>2</sup> But the Levitical Code seems to have altered these rules.<sup>3</sup> Under it, the slave served until the year of jubilee. He then returned to his family possessions, taking with him his wife and children. But it is very uncertain how far this stipulation effected any real change in the law. Indeed, it is extremely doubtful if the year of jubilee, in the sense of the Levitical Code, ever became a real institution. Probably it remained a mere expressed desideratum of an ideal constitution.

The foreign slave — generally purchased from the Philistines, when not taken in war — had not the right of manumission after six years. This was the great difference between the classes of slaves. In addition to this, the foreign slave, not being an Israelite, had no part in the worship of the household or in the public religious festivals.

Each class of slaves had certain rights as against their masters. Their position was in some respects superior even to that of a son, inasmuch as the master did not, as among the Romans, have absolute power of life and death over his slave. The law, however, was very lenient in its application. Thus, though the slave died from the

<sup>1</sup> Ex. xxi. 4.

<sup>2</sup> Cf. Ex. xxi. 7 *et seq.*

<sup>3</sup> Lev. xxv. 39 *et seq.*

effects of blows received from his master, the latter was not punished if the slave lived a day or two after the assault. The master's loss of property in his slave was considered sufficient punishment. But if, in striking the slave, the master knocked out an eye or a tooth, the slave was given his freedom. Furthermore, the slave had a right to the Sabbath rest. According to Deuteronomy<sup>1</sup> this rest was not instituted in commemoration of the seventh-day rest of Jehovah after the creation, but as a day of rest for the whole household and especially for the slaves.<sup>2</sup> A slave who ran away from his master was not delivered up by the person to whom he fled.<sup>3</sup> The explanation of this seems to be that only intolerable cruelty on the part of the master would have provoked the slave to flee. As is the case with much of the Deuteronomic Code, this law was an advance from the customs of the times of the first kings. Furthermore, according to the primitive law, the slave even seems to have had the rights of an heir in default of issue of the head of the family.<sup>4</sup>

#### SECTION IV. — PROPERTY RIGHTS

The property law of the Israelites finds but small place in the codified law. But this is not in any way remarkable. In the centuries preceding Christ, the Israelites were not a mercantile people. Their neighbors, the Phœnicians, were the merchants of their time. There was therefore among them no such elaborate system as prevailed in Babylonia and Phœnicia. The laws of Israel were, however, undoubtedly amply sufficient for a small agricultural and grazing community. Those customary laws of property, which have been preserved by enactment and codification, have reference chiefly to purchase and sale and to debt.

Land was bought and sold in the presence of witnesses,

<sup>1</sup> Deut. v. 12 *et seq.*

<sup>2</sup> See Ihering, *op cit.*, p. 113 ff., and pp. 147 and 153.

<sup>3</sup> Deut. xxiii. 15.

<sup>4</sup> Gen. xv. 2 *et seq.*



and the money price was then and there weighed out and paid.<sup>1</sup> This was certainly the custom in the earlier period of the kingdom, as is shown by reference thereto in the history of the Patriarchs — a history doubtless in many respects freely reconstructed according to later conceptions. But in the time of Jeremiah<sup>2</sup> deeds were in use. These deeds were twofold : an open and a closed or sealed deed. Both seem to have been given to the purchaser. Possibly the object here sought was similar to that of the double deed of the Babylonians. The deed was executed with the signatures of the contracting parties ; it was then sealed, and the money was weighed out and delivered in the presence of witnesses, who subscribed their names to the deed.

In the earlier law there were certain symbolic acts connected with sale, but these gave way before the written deed. Among these symbolic acts was that of the vendor giving his shoe to the purchaser. He thereby signified that he renounced his right to the land.<sup>3</sup> The significance of this symbolic act is shown in the renunciation of the right of reclamation or redemption of family property. The *goel*, or near kinsman charged with the duty of redemption, purchased the land, and if the owner had died childless he married the widow. In the case of Ruth, Boaz was not the *goel*, but if the *goel* had died he would have become the *goel*. He was, moreover, the only near member of the family who was in a position to redeem the property. The legal *goel*, by plucking off his shoe and handing it to Boaz, renounced his right or title in the land, possession of which had passed to a third party.

The act of plucking off the shoe also appeared in the case of a man who refused to marry the widow of his

<sup>1</sup> Gen. xxiii. 7-20.

<sup>2</sup> Cf. Jer. xxxii. 7 *et seq.*

<sup>3</sup> The origin of this custom is not clear. It was possibly connected with the right of possession and occupancy. The shoe may have been regarded as symbolic of standing upon the land.

childless brother. His shoe was forcibly plucked from his foot in order to deprive him of his right to inherit. It is probable that this ceremony was retained in this case long after it had been abandoned in the case of ordinary sales.

The conception of ownership underlying the laws governing the sale of land was the idea that the land had been given by Jehovah to the whole people; that it was to be divided according to tribes, and subdivided according to families. The national religion tended to render the tribal and family relations increasingly important; whatever uncertainty once existed as to the actual relationship of the various families and tribes, it had disappeared by the time of the great codifications. The heritage of land belonged to the family, and was handed on as a sacred charge from father to son. The answer of Naboth to Ahab, "The Lord forbid it me, that I should give the inheritance of my fathers unto thee," was the sentiment of every loyal Israelite.

The development of the right of redemption of family property was similar to that of a number of institutions. A custom, in some cases common to the Semites,—for instance, circumcision,—was brought into relation with religion, which had been gradually refined by processes peculiar to itself. Thus, something similar to the right of redemption was found among the Babylonians,<sup>1</sup> and differed from the Hebrew custom chiefly in that among the Israelites there was always the tradition of the division of the land among the people.

There is no evidence as to the nature of the earliest form of redemption in Israel. The right to buy back the family inheritance was given to the son. The nearest agnate enjoyed the same right. In Babylon this right was possessed by the son, but in that essentially commercial city the right of the agnate soon disappeared. The

<sup>1</sup> See *ante*, p. 23 ff.

law of the Israelitish kingdom is shown by the story of Ruth, and also by the act of Jeremiah, who bought the field of Hanameel, his cousin, because the right of redemption belonged to Jeremiah. Whether the right of redemption belonged exclusively to the person to whom the land would have fallen as an inheritance is a point which cannot be determined. Again, it is wholly uncertain how long this right of redemption lasted. In the case of Jeremiah and Hanameel, the redemption was made at the request of Hanameel. This seems to differ from the procedure of the Babylonians. The vendor had the right of reclamation, unless he had by contract put himself beyond the operation of the law. The heirs of the vendor were not bound by his acts, but had no rights until his decease, when his rights passed to them.

The Priestly Code introduced a system of universal redemption, or release, in connection with the jubilee year. According to this institution, no arable land could be alienated for more than fifty years. At the expiration of that period it reverted to the original proprietors. The amount to be paid for the land was determined by the number of years for which the land was sold. When it reverted, no payment was made by him to whom it reverted. A distinction was made as to classes of land. Real estate contained in a walled town could be alienated in perpetuity, provided that it was not reclaimed or redeemed within a year. Other land was recovered in the year of jubilee. But Levitical land, in a walled town or in the country, was not permanently alienable.<sup>1</sup> How far these laws were in force prior to the Captivity is uncertain. The theological explanation of the law was that the land belonged to Jehovah, and that those who occupied it were merely strangers and sojourners in it.<sup>2</sup>

The change in the law which appears in the Priestly Code was apparently feasible in the State which was in

<sup>1</sup> See Lev. xxv. 25 *et seq.*

<sup>2</sup> Lev. xxv. 23.



process of formation on the return from Babylon. The code was compiled for the Israelites who had returned. These were few in number, and for the most part dwelt in the cities and larger towns. The easily foreseen inconveniences of a universal restoration of real estate at the year of jubilee limited the application of the law to the country which was cultivated in the immediate vicinage of the towns and cities.

#### SECTION V.—DEBT, PLEDGE, AND INTEREST

No part of law is more dependent upon the culture of a country than that which deals with debt. The system of credit, which arises of necessity in a commercial community, is unknown among simple agriculturists. The idea of mortgages, loans, and indebtedness is in every simple community associated with poverty and distress; the creditor is regarded as an enemy, and interest as an injustice. This idea is to-day prevalent in many places, and in the simple agricultural community of Palestine it became formulated in the laws of the Pentateuch, and afterward exercised profound influence upon the laws of Christian countries.

The Babylonian law concerning debt,—including loans, mortgages, and banking,—was based upon the idea of contract whereby the parties were under mutual obligations and derived mutual benefits. The law of Israel in this matter was founded upon the idea that the debtor had fallen into the power of the creditor and needed the assistance of the law to defend him from exactions and harsh treatment. This is seen throughout the great codes. Thus, in the "Book of the Covenant" there are provisions<sup>1</sup> for the release of the bond-servant in the seventh year. A man who sold himself or his son as a slave was reduced to poverty, probably in debt, and sought in this way to free himself. In the seventh year the debt was can-

<sup>1</sup> Cf. p. 109.

celled, and the slave was freed. In the passage<sup>1</sup> which forbids the taking of interest, there seems to be a gloss inserted. Thus the text reads, "If thou lend money to any of my people with thee that is poor, thou shalt not be to him as a creditor; *neither shall ye lay upon him usury.*" This verse should be rendered so as to forbid exorbitant interest, and the gloss should not be usury, but interest.<sup>2</sup>

The customary law of pledge finds its first expression in the "Book of the Covenant," where we find the provision that the cloak pledge was to be returned at night, the cloak being the garment used by the poor as a bed-covering. In the Deuteronomic Code, the humanitarian principle of the law was further extended. The articles necessary for the support of life — *e.g.* the mill or the upper mill-stone — were not to be taken as a pledge. The article pledged was not to be selected by the creditor, but he must stand without the debtor's house "and the man to whom thou shalt lend shall bring forth the pledge without unto thee."<sup>3</sup> A garment must be returned each sundown. The widow's raiment might not be pledged. According to the same code, the provisions of release in the seventh year, which had formerly applied only to cases in which a man was sold, or sold himself, for debt, were extended to all loans.<sup>4</sup> This, however, applied only to loans among Hebrews. The foreigner was not released from his debt. In the portion of the code to which reference has been made, the seventh year is more clearly defined than elsewhere. It is a year which is absolutely fixed, and therefore might happen to be the year immediately following that in which the debt was contracted.

<sup>1</sup> Ex. xxii. 25.

<sup>2</sup> The distinction between usury, or exorbitant interest, and allowable interest is nowhere determined. That there was a distinction is clear, from this passage and others. (Cf. Ezek. xviii. 8, 13, 17.)

<sup>3</sup> Deut. xxiv. 11.

<sup>4</sup> Deut. xv. 1-11.

In this case, the loan would be little else than a gift, and so would rarely be made. The Deuteronomist perceives this fact, and exhorts the Hebrews to brotherly kindness and charity. But it was soon discovered that this system of credit was impracticable. The provision of the Priestly Code, by which the jubilee year occurred but once in every half-century, abrogated the old law, which had made business difficult. The ingenuity of the Hebrew jurists added not a little by way of relief. In the time of Jeremiah, in the last years of the Jewish monarchy,<sup>1</sup> the seventh year was not regarded as fixed, but only as relative to the indebtedness.

The Priestly Code continued the prohibition of the taking of interest from a fellow Jew; the practice was, however, still tolerated in respect to foreigners. There could have existed no permanent condition to which such a system of credit could have been suited, even if such a condition ever existed at all.

#### SECTION VI. — TORTS AND LIABILITIES.

No department of Jewish law is more illustrative of the great primitiveness of that system than is the law of torts. This includes a vast number of wrongs and injuries, some of which we might have expected to find treated as crimes. In earliest times the crime of murder was brought under the law of retaliation. Later, a money compensation seems to have been allowed. Under the "Book of the Covenant,"<sup>2</sup> murder became a crime, but the guilty party had certain rights of asylum. In the case of theft, the criminal element was not distinguished; partly because the ancient saying, "Whoso sheddeth man's blood, by man shall his blood be shed,"<sup>3</sup> had no counterpart applicable to the case of theft. The thief was, however, compelled to pay to the owner of the stolen property more than the

<sup>1</sup> Cf. Jer. xxxiv. 8 *et seq.*

<sup>2</sup> Ex. xxi. 12.

<sup>3</sup> Gen. ix. 6.



value of that property. If he still retained possession of the stolen ox or ass — for such were the chief articles of value — he must return the beast and another as well ; if he had killed or sold it, he forfeited to the owner four or five times its value.

There are several other classes of wrongs which were regarded from much the same standpoint. Of these, two are most important. When property, not consisting of cattle, was intrusted to the care of another, and it was stolen, if the thief was discovered, he was compelled to pay double value to the owner. If the thief was not discovered, the question of the bailee's guilt or innocence was determined by some ordeal.<sup>1</sup> When cattle were delivered to another to be cared for, and an ox or sheep was hurt, killed, or driven away, the herdsman, if there were no witness, could clear himself by purgation. If it was clearly a case of theft, restoration had to be made, as the loss was due to the negligence of the herdsman. If the animal was hurt or destroyed by wild beasts, the herdsman was not compelled to make restitution. It is apparent that this is a view of the duties of the bailee which is very similar to the modern conception. An interesting development was the case of injury done to a "hired thing," in which case the bailor could not recover. The price of the hire was held to include insurance for damage.

In the case of liability for negligence or for damages done by certain animals, there is close resemblance to more modern law. The owner of an ox which was not known to be dangerous was not responsible for the death of a man who had been gored by the ox. He was free of liability upon surrender of the ox, which seems to have been regarded as deodand, inasmuch as it was stoned to death, and its flesh was not eaten. But if the ox was known to be dangerous, and was loose through negligence on the part of the owner, the owner was liable for any

<sup>1</sup> Ex. xxii. 7-9.

death caused by the ox. He could redeem himself by payment of a ransom; otherwise he must die. Corresponding regulations were enacted concerning injuries done by animals to one another, and as to wrongs committed by carelessness. In the case of damage feasant, committed by turning beasts loose in another's field or vineyard, the amount which could be recovered might not exceed that of the actual damage. For the determining of this amount, the law provided an easy method. The owner of the beasts must make restitution from the best of his own field or vineyard.<sup>1</sup> He who kindled a fire whereby the grain of a neighbor was consumed was obliged to make restitution.

The principles of the Hebrew law of damages for wrongs is expressed in a few general cases. But it must not be thought that the application of the law was confined to these few cases. These were merely instances which illustrated principles. There was no maxim regarding the construction of statutes which defined penalties. The restitution which was demanded was less a penalty than a quittance of claim, which claim had been acquired by the wronged person by reason of the injury. The elders, in their judgment upon the cases submitted to them, extended the principles of the law to a multitude of analogous cases. Thus it was that the jurisprudence of a nation could be so codified in a few verses as to suffice for the needs of several centuries. In regard to the law of damages the Deuteronomic Code adds nothing to the "Book of the Covenant." The Priestly Code has little to say in this connection; but it makes one important modification by the enactment of a general law of restitution in case of wrongs "in a matter of deposit, or of pledge, or of robbery," extortion, finding lost articles, and similar matters. According to that code, the restitution was to be made in the exact amount of the damage,

<sup>1</sup> Ex. xxii. 5.

the value of the animal stolen or killed, plus one-fifth of its value. Here were certainly no excessive damages. But connected with this is the demand that the guilty person must free himself of guilt by the sin-offering of a ram.<sup>1</sup> Here may be discovered the beginnings of a distinction between torts and crimes. The required sacrifice seems to have been designed as a punishment. Certainly it was the germ of a more developed penal legislation.

#### SECTION VII. — SUCCESSION

Among the Israelites the law of succession is derived from the law of the family. As the latter showed many points of resemblance to the Aryan law, especially as it existed in Athens and Rome, so the law of inheritance presents striking similarities. Thus, property descended in the male line. But that this was due to the same religious ideas as obtained among the Aryans is by no means certain. In the Old Testament there is no trace of ancestor-worship, although there are many other "survivals" quite as contrary to the customs of the times in which the sacred books were compiled. But there does seem to have been something which in effect was the same,—the desire of every man to perpetuate his life through male offspring. The assumption of any more universal principle than this lacks verification.

Wills or testaments were utterly unknown in Israel. Property was divided among the sons, the preference being given to the first-born by assigning to him two portions of the inheritance. This applied only to movables. Nothing is known as to inheritance of land, whether it was divided or not. The "first-born" was the first-born son of his father. This rule was a part of the earliest law of the nation, though it was occasionally set aside, as in the case of Jacob and Esau. Sometimes, too, in polygamous families, the favorite wife might obtain the

<sup>1</sup> Lev. vi. 1-7.



birthright for her son, as in the case of Solomon. But the reformation of the law, contained in the Deuteronomic Code, forbade this practice; the descent might not be diverted from the traditional course.<sup>1</sup> As the head of the family the elder son was obliged to support the unmarried females of the family.

In case of failure of an heir, the provisions in the case of the Levirate marriage and that of an heiress were similar to those of the Athenian and Roman law. The nearest agnate succeeded to the estate of the man who died without issue. He married the widow; but owing to the custom of polygamy he was not compelled to divorce his own wife. The first child born of the new union was reputed the son of the dead man, and eventually inherited the estate. If the deceased left a daughter, but no son, by the later or Priestly Code the daughter inherited. Women thus inheriting were not allowed to marry into any tribe but their own, since such marriage would cause property to pass from tribe to tribe.

If there were no daughter, the estate passed to the brothers of the deceased, or, in default of these, to the brothers of his father. In default of the latter, the estate passed to the nearest kinsman.<sup>2</sup> This succession of the nearest agnate is a part of the oldest law, although its appearance in connection with the statute permitting the succession of a daughter makes it appear as if it were of modern origin, as was the latter regulation.

#### SECTION VIII. — LATER HEBREW LAW

In the last centuries of the Hebrew national life and those immediately following the overthrow of the Jewish State, the Hebrew law, as it is contained in the Pentateuch, became the subject of an elaborate comment, which has been preserved in the Talmud. This great collection of legal treatises and expositions of law covers the

<sup>1</sup> Deut. xxi. 15-17.

<sup>2</sup> Num. xxvii. 8-11.

whole of the Pentateuch, and has obtained in the Jewish legal system much the same authority as did in the Roman law the glosses in the law schools of Bologna. The text upon which the comment was written and the treatises founded has been quite superseded by the gloss. The Talmud consists of two parts, respectively named after the cities to which their composition has been attributed. These parts are the Babylonian and the Jerusalem Talmuds, of which the former is much the longer.

The Mosaic Law, or the Jewish legal system, was so intimately connected with the religion of the nation that religious fervor gave it a longer hold on life than might have been the case had it depended merely upon its juristic excellencies. After the Greek and Roman conquests, the policy of the conquerors was to allow subject nations to retain, as far as possible, their own legal systems. The idea of law as uniform throughout a nation or empire was unknown. Law was the possession of a race, in the same way as was religion. The local judicial system was therefore generally retained in Judea, although deprived of some power in respect to the infliction of punishment. Spiritual penalties, however, were for the most part quite as effective as the secular sanctions of the law. With the final overthrow of the Jewish State, the destruction of Jerusalem, and the crushing of the insurrections in the following century, the Jewish law was deprived of much of its authority, and its religious element was brought into greater prominence. But the careful study of that law was pursued with no less zeal; indeed, the greater part of the Hebrew legal treatises date from the period following the destruction of the Jewish State. They contain, however, the traditional interpretations of a very early date, and may be received as quite trustworthy for a period long anterior to the fall of Jerusalem.

The close connection between the Hebrew religion and the Jewish national law made the retention of that law a

duty imposed upon all devout Jews. Throughout their dispersion, that law served as the private and personal law of the race. Its enforcement has to a great extent been left to the individual communities of Jews; but the secular courts have taken cognizance of it as still retaining a certain binding authority as the custom of a class.

The Christian theology has retained the Jewish Scriptures and has regarded them as a divine revelation. The legal system of those Scriptures, although theoretically done away with by the fulfilment of the law in the Christian Messiah, has ever exercised a profound influence upon all Christian legislation. In many periods of European history, the Pentateuch has been treated as a fundamental law on many subjects.



## CHAPTER V

### THE LAW OF INDIA

#### SECTION I. — HISTORY AND SOURCES

THE distinction which was made between the Roman law and religion, and in the great codifications of the West between law and religion in general, was unknown in the East. The same influences were not there at work upon the national life and thought. No world-wide commercial activity, no decay of the ancient faiths, no new and utterly antagonistic creed destroyed the unity of religion, law, and ethics which was maintained throughout the history of India. The books of the law resemble the Old Testament, and especially the Pentateuch, rather than the Institutes and Digest. Ritual law, cosmogony, philosophy, practical moral precepts, and many other subjects, were everywhere mingled in what would seem inextricable confusion, were it not that the whole life of man was in India treated exclusively from the religious standpoint, and that no circumstances had arisen to cause a distinction between theology, philosophy, and law as independent sciences.

The law of India is founded in the first instance on the Vedas. They are the supreme source of all law, and they contain both rules of conduct, which have become a part of the legal system, and many passages which have been treated from a legal standpoint, although of no juridical intent in their original collocation. Closely connected with the Vedas are the Dharmasutra, which form the first order of law-books and may be treated as sources

of law. A second great source is found in the large number of books composed in rhythmical form, known as the Dharmasmṛiti. They are more or less closely connected with the Dharmasūtra, and through them with the Vedas. Their authority is secondary to that of the Vedas, and this subordination is indicated by the name "smṛiti," or resemblance — *i.e.* traditions of the more ancient time. But the Vedas are regarded as "sruti," or revelation. Nearly related to the Dharmasmṛiti was the Mahabharata, which obtained a certain legal authority, in much the same way as did the writings of Homer. The third great source of law is the host of commentaries which have been written upon the Smṛitis. These were written at a comparatively recent date, and owe their importance to the kings or governors under whom they were composed. Their effect has been the gradual displacement of the older sources, so that at the time of the establishment of English rule in India they were practically the only law-books in use.

The number of legal hand-books or institutes — Dharmasastras — in use at one time or another is legion. Almost every one of the innumerable legal schools had its own text-book, and this was committed to memory and commented upon at length. Among these one, the *Manava Dharmasastra*, seems to have attained especial prominence. Many commentaries were written upon it, even in the most widely severed districts and at a very early period. In common with the many other Smṛitis, this work claims a mythical origin — a machinery well suited to a didactic poem which should embody the general law of the whole body of Aryans and impose implicit obedience. The work is attributed to Manu, the descendant of the self-existent Brahma. The origin, as given in the book itself, is as follows: The great sages have approached Manu with a request for an explanation of the law. This he condescends to give. He says that he

has learned "these Institutes of the Sacred Law" from no other than the Creator who had produced them. Manu himself taught them to Mariki and the other sages.<sup>1</sup> After giving this account of the origin of the sacred law, Manu continues: "Bhrigu here will fully recite to you these Institutes; for that sage has learned the whole in its entirety from me." In this way Bhrigu is constituted the interpreter of Manu.

The date of the laws of Manu is very nearly that of the Mahabharata — hardly later than the second or third century A.D. The laws and the epic have many points of affinity. They are composed in the same metre and were due to the same artistic and literary impulse.

The author of the laws based his poem upon a number of older legal books, and was evidently acquainted with the teachings of various legal schools. He aimed to compose a work which would be acceptable to all classes. To further this end he adopted the legendary form, attributing his work to the inspiration of the Supreme Being, who spoke through the Father of all men.

The various law-books and commentaries upon books of established position were works of scholastic jurisprudence. They were not authoritative, in the sense that the legal codes of the West were authoritative. The real authority lay in the traditional and customary law. The various Smritis, however revered they might be, were at the best no more than private collections, claiming to embody that customary law. Inasmuch as they were written by Brahmans for Brahmans, the caste distinctions are emphasized in favor of that caste. Members of that caste constituted the privileged rank, and the great mass of the law, as they treated it, concerned them. The majority of the population stood so far beneath them that to spend much time in discussing matters relating to the masses was not considered worth while. In spite of this

<sup>1</sup> Manu, I, 58.



prejudice, and of the practice of emphasizing those points of the law which were no longer in force and of adapting the law to the actual conditions of the times, a vast amount of the older traditional and customary law was preserved. As this was considered by the legal writers to be a part of a revelation, it was allowed to stand beside the more recent law, though this was in contradiction to it.

Another difficulty in connection with the Smriti law was the inability of the authors of these private codes to distinguish between what was law and what, according to the pious opinions of the writer, ought to be law. But the opinion of a famous teacher naturally had great weight in working a change in the law as enforced. Only a few years were needed to cause the mythological form in which such books were cast to be accepted as fact. The whole mass of laws would then be treated as upon the same footing. There was no authoritative, or official, code with which every new compilation could be compared. There were no reports of decisions. The method employed was not that of the Roman juriconsults, who developed the law by deductive reasoning; it was that of the incorporation of new and even foreign matters, which after a short period became law by the mere force of association and tradition.

## SECTION II.—DOMESTIC RELATIONS

The fundamental law of the Aryans, both in their political organization and in their civil relations, was the law of family. This retains its normal place in the Hindu law. It stands in the forefront of the jurisprudence of that race, and is the natural introduction to the other elements of the law. For the family, in its larger or smaller form, was the unit; the members of the family stood in the eyes of the law, not as individuals, but as members of a corporation.

The foundation of a family was the beginning of a

man's proper position among men. In the begetting of offspring there was provision made for the continuation of family worship; hence the saying, "He only is a perfect man who consists of three persons united, himself, his wife, and his offspring;"<sup>1</sup> thus says the Veda; and learned Brahmans propound this maxim likewise: the husband is declared to be one with the wife."<sup>2</sup>

A woman was married according to one of eight different forms, each of which was considered more appropriate to one or another of the four castes. These eight forms of marriage are named after the order of the gods and demons, and, beginning with the highest, are as follows: (1) The Brahma rite, in which the daughter provided with a rich dowry is presented to a learned man selected by her father; (2) the Daiva rite, in which the girl with a dowry is given to a priest, who during the ceremony officiates at a sacrifice; (3) the Arsha rite, in which the bridegroom pays a cow and a bull, or two of each, to the bride's father; (4) the Pragapatya rite, in which the father of the bride, showing honor to the bridegroom, says to the couple, "May both of you perform well your duties"; (5) the Asura rite, in which "the bridegroom receives a maiden after having given to her kinsman and the bride herself as much wealth as he can afford, according to his own will"; (6) the Gandharva rite, in which there is a voluntary union, springing from desire and with sexual intercourse as its object, between a maiden and her lover; (7) the Rakshasa rite, or "the forcible abduction of a maiden from her home, while she cries out and weeps, after her kinsmen have been slain or wounded and their house broken open"; (8) the Paisakas rite, or the violation by stealth of a girl who is sleeping, intoxicated, or disordered in intellect.<sup>3</sup>

These forms of marriage are of importance as belong-

<sup>1</sup> Cf. chapter, "The Law of Egypt," p. 82.

<sup>2</sup> Manu, IX, 45.

<sup>3</sup> Manu, III, 21-34.

ing to the various castes, although not especially limited. The Rakshasa rite, or marriage by capture, although generally condemned, was a survival of an earlier custom, and had probably become a mere form, in which case it was a rite and nothing more. The Gandharva, which was without parental consent, was for the most part the privilege of a noble. The plebeian form of marriage was the Asura, or marriage by purchase. This was allowed only to the two lowest castes, and was condemned by many Smritis,<sup>1</sup> but was too firmly rooted to be eradicated. The Brahman could marry only according to the first four forms. The child born of a marriage was able, according to the rite followed at that marriage, to benefit a proportional number of ancestors by his sacrifices. The right of the husband, or the parents of the wife, to inherit the wife's dowry, was regulated by the marriage ceremonial employed.<sup>2</sup>

Marriage was imposed upon all who would not be monks. A girl who did not marry lost her caste and became a Sudra. The father of a girl who was thus dishonored lost his parental authority. The result of all this was the arrangement of a marriage while the girl was still very young. The girl was betrothed, and therein was the essential act of marriage. When the bride reached puberty, she was taken to the home of her husband. This latter proceeding was not necessary to constitute her a lawful wife, for "the betrothal by the father or guardian is the cause of the husband's dominion over his wife."<sup>3</sup>

There were four principal impediments to marriage. Of these the first had merely a religious, not a civil, effect. It consisted in the right of the elder brother or sister to marry before the younger. If this custom was traversed, the marriage was declared invalid, a penance was imposed, and the parties were remarried. The second impediment was the lack of virginity on the part of the bride. This ruled out the remarriage of widows—a serious matter

<sup>1</sup> Cf. Manu, III, 51-55.

<sup>2</sup> Manu, IX, 196 ff.

<sup>3</sup> Manu, V, 152.



because of the tender age of most brides.<sup>1</sup> The third impediment lay in the inequality of the castes. Here, however, there is no little confusion. The fourth impediment was that of consanguinity, or affinity traceable through either father or mother, though in different degrees, and the tendency of the law was to extend these prohibited degrees.

There was little or no divorce. This was due partly to the expense of the wedding, which was always celebrated with the utmost pomp, partly to the possibility of polygamy. On the part of the wife there was no possibility of obtaining a divorce. She was absolutely under the tutelage of her husband. The law was varied as to the theoretical right of the husband to divorce. An innocent wife might not be abandoned except by incurring very severe penalties. An adulteress was not repudiated, but punished, by her husband. The sterile wife, or she who bore only daughters, was set aside, and another took her place; yet the first remained in the house of her husband.

The polygamous marriage was the exception, although it was entirely lawful. The monogamous family was more in accord with the spirit of the law, inasmuch as by this but one wife might be present with her husband at the family sacrifices. When the family consisted of several wives of the same caste as their husband, the wife who had been first married was given precedence. When the wives were of different castes, she of her husband's caste had the precedence. If none were of the same caste as the husband, she who was of highest caste, provided she was not a Sudra, had the privilege of being associated with her husband in the sacred rites.

The condition of the widow was variously regarded, and was the subject of no little controversy. The Brahmanic conception of the duty of the wife toward the husband led to the custom of suttee, or the burning of the widow on the funeral pyre of her husband. This custom

<sup>1</sup> Cf. p. 128.

is not mentioned in the older literature, even where the burial rites are described in most minute detail. Manu, Yajnavalkya, and Narada omit mention of such a custom in their elaborate account of the duties of a widow. When the practice of suttee appeared, it was not as an imperative rule, but as an optional matter, whereby the widow obtained great reward. A modest and chaste life was of equal worth, though suttee were not undergone. The suttee was at first practised by the widows of kings and princes, and generally those of princely family. The favorite wife or servant of the deceased was made, through fire, to accompany him to the shades. From this example the custom spread to other and less important families.

The early literature contains numerous provisions for the widow. They are in general founded upon the idea that a woman must always be under tutelage. "Her father protects her in her childhood, her husband protects her in her youth, and her sons protect her in her old age; a woman is never fit for independence."<sup>1</sup> In case the widow was childless, she was provided for by a custom which is strikingly similar to the Hebrew Levirate marriage; it is based upon two different theories, and has been developed to a remarkable extent. The basic theories are, first, that a widow bearing a son to a near relative of her husband, bears a son to the family of her husband; and thereby the performance of the sacrifices for the dead are rendered possible. The son so born inherits the property.<sup>2</sup> The second theory is that the offspring of a wife belongs to the husband, according to the principle that "those who, having no property in a field, but possessing seed-corn, sow it in another's soil, do indeed not receive the grain of the crop which may spring up."<sup>3</sup> This principle was carried out to its fullest extent. "If a child be born in a man's house and its

<sup>1</sup> Manu, IX, 3.

<sup>2</sup> *Ibid.*, 190. Note that the widow is not married to the relative of her deceased husband.

<sup>3</sup> *Ibid.*, 49. Cf. 48-56.

father be not known, it is a son born secretly in the house (Gudbotpanna), and shall belong to him of whose wife it was born.”<sup>1</sup> This was one of the six classes of sons who were both kinsmen and heirs.<sup>2</sup> In the same way, a woman might “by appointment” bear a son by another than her husband, and the son be regarded as that of the husband, even if the latter were dead, diseased, or a eunuch.<sup>3</sup>

The position of the son was the same in India as elsewhere in ancient times. He was legally little better than a slave. According to Manu,<sup>4</sup> “A wife, a son, and a slave, these three are declared to have no property; the wealth which they own is acquired for him to whom they belong.” This rule is explained by several of the more important commentators, Medhatithi, Govindaraga, Kullukabhatta, and Raghavananda, to mean that the wife, the son, and the slave are unable independently to dispose of their property. Narayana interprets the passage as referring to the incapacity of these persons to earn money by working for others. On comparing the quoted verse of Manu with that which follows, it appears that the slave at least had no right to his *peculium*, or rather had no *peculium* at all. His goods might be seized by his master. This was in striking contrast with the law of Babylon, and was doubtless the result of the caste system, which seems to have played no important part among the Semites. Some sons had what might be called a *peculium*. This was an exception, and seems to have been introduced as an honor to the learned class; thus, “Property acquired by learning belongs solely to him to whom it is given; likewise the gift of a friend, a present received at marriage or with the honey-mixture.”<sup>5</sup>

<sup>1</sup> Manu, IX, 170.

<sup>2</sup> See under “Inheritance,” p. 134.

<sup>3</sup> Manu, IX, 167.

<sup>4</sup> Manu, VIII, 416.

<sup>5</sup> Manu, IX, 206. Property acquired by learning was a fee for teaching or money received for proficiency in any art, especially for knowledge of casuistry and the solution of difficult problems therein, or for brilliant recitation of the Vedas.



Although, as will be seen, the son was protected by the law, as long as he remained under the *patria potestas* none of his transactions could have any legal validity. That which he did independently was, as far as the family was concerned, not done at all. But the father might in some cases—as when he became incapable, because of disease or great age, of managing the family property, or during his absence—be superseded by the eldest son.

A son, other than the eldest, might be sold by his parents to be adopted into another family. The right of the Roman and Babylonian father to sell his son as a slave was a development of the *patria potestas* which does not seem to have occurred in India to the same extent as elsewhere. With the growth of a more refined moral sense, the practice of adoption of sons very considerably increased, and other methods of providing succession became less important; by some schools of law they were completely abrogated. A son might be abandoned by his parents; but if he was unjustly abandoned, the parents lost caste, and were fined six hundred panas.<sup>1</sup> The same penalty fell upon him who sold his child,<sup>2</sup> though the sale seems to have held good.<sup>3</sup> This rule stood upon the border line between law and morals. The right belonged to the father by immemorial custom, but he was forbidden by propriety to exercise it.

The transfer of the son from one family to another was not necessarily by a formal sale, as at Rome. In fact, such form of adoption was exceptional. The customs varied in different provinces. The adopted son, although he became the son and heir of his new father and was

<sup>1</sup> Manu, VIII, 389. By abandonment, the commentators understand refusal of maintenance.

<sup>2</sup> *Ibid.*

<sup>3</sup> This custom was, however, positively forbidden by one of the oldest of the Dharmasutras, the *Apastamba*, 2, 13, 11.

competent to perform the funeral rites, nevertheless remained in sufficiently close connection with his own family to inherit from his real father. At least, this was the case in many parts of India.<sup>1</sup>

### SECTION III. — THE LAW OF INHERITANCE

The law of inheritance is more carefully developed than is any other portion of the civil law of India. Indeed, it is the most characteristic feature of that law. It is far more complicated than the Roman law of inheritance, which was enabled by the intimate union of the law of the *manus* and the law of *mancipium* to develop a theory of wills. A portion of the Indian law of inheritance has been alluded to in the section dealing with the enactments as to widows. It is now in order to systematically state the whole law.<sup>2</sup>

The legal and proper object of marriage was to beget a son who could perform the funeral rites of his father, and thus insure to the latter an eternity of bliss.

“Through a son he conquers the world, through a son he obtains immortality, but through a son’s grandson he gains the world of the sun.” Because a son delivers his father from the hell called Put, he is therefore called put-tra (a deliverer from Put) by the Self-existent himself. Between a son’s son, and the son of a daughter there exists in this world no difference, for even the son of a daughter saves him [who has no sons] in the next world, like the son’s son.”<sup>3</sup>

<sup>1</sup> See Jolly, in Bühler’s *Grundriss der Indo-Arischen Philologie*, Bd. II, heft 8, p. 75 f.

<sup>2</sup> Here, as generally elsewhere, the law of Manu is followed, though not as being the only legal system or wholly in force; for, like other ancient codes in which religion was combined with ethics and law, it was partly an ideal sketch of what the law should be. A few variations from this law are noted. It may be accepted as a fair representation of ancient Hindu jurisprudence.

<sup>3</sup> Manu, IX, 137–139.

There are twelve kinds of sons, of which six are kinsmen and heirs, and six kinsmen but not heirs. In the first class, the highest is the real son, or *Aurasa*, the legitimate son of the body of the father, begotten on his own wedded wife. This son has the precedence over other sons. He performs the obsequies. "Whatever result a man obtains who tries to cross a sheet of water in an unsafe boat, even that result obtains he who tries to pass the gloom of the next world with the help of bad substitutes for a real son."<sup>1</sup> The next in order to the *Aurasa* is the son begotten, according to the peculiar law, by the husband's brother on the "appointed wife." He is called *Kshetraga*, or son begotten on a wife. These two sons share the paternal estate, four-fifths falling to the legitimate son. The other four sons of the first class are, the adopted son of equal caste who has been given to the man and by solemn rites made his own; the son adopted without religious ceremony; the son born in a man's house of an unknown father; and the son who has been deserted by his parents and adopted by the man. The second, and inferior, class of sons are as follows: the son of an unmarried girl, born in her father's house, who becomes the son of him who marries her; the son received with the bride, when the bride is pregnant at marriage; the child who is bought to fill the place of a son; the son of a woman abandoned by her husband, or of a widow; the self-given son, or the young man who, having lost his parents or having been unjustly abandoned by them, gives himself to a man; and the son begotten through lust by a Brahman on a Sudra female, such a son being regarded as no better than a corpse.<sup>2</sup> "These eleven, the son begotten on the wife, and the rest as enumerated above, the wise call substitutes for a son, taken in order to prevent a failure of the funeral ceremonies."<sup>3</sup>

The inheritance was ordinarily not by a division of the

<sup>1</sup> Manu, IX, 161.

<sup>2</sup> *Ibid.*, 178.

<sup>3</sup> *Ibid.*, 190.



property, but by participation in the family property, which frequently remained undivided for generations. The family was regarded as a whole, under the authority of the father. The earnings of the various members ordinarily fell into the common treasury. An exception, in the Brahman caste, was made of property acquired through learning; and in the Kshatriya caste, of the booty taken in war, provided that the weapons and other equipments employed were not a part of the family property. The members of a family were often very numerous. The sons married at a very early age, and the *pater familias* often lived to become a great-grandfather.

The right of the father to the management of the family property was limited by law. Otherwise the sons, who had a right to participate in the family estate, would often have been defrauded of their legitimate expectations. This regulation and limitation of the *patria potestas* was founded upon exceptions to that rule of the community which declared that the products of labor belonged to the whole family. A man could not dispose of the estate inherited from his father so as to deprive his sons of their share of the inheritance. It was family property, and practically inalienable.<sup>1</sup> But the father was not obliged to put into the common treasury property acquired by his own efforts, or ancestral estates which had been lost and recovered. Nor need he administer it in any way except according to his unrestrained good pleasure. It was self-acquired property.<sup>2</sup> But if a man divided self-acquired property among his sons, it would at once, with respect to his grandchildren, become hereditary family property, in which those grandchildren would have a claim.

On the death of the *pater familias*, the eldest son stepped into the vacant place and administered the family property. But an especially well qualified younger son might, with the consent of the eldest son, take the office and the

<sup>1</sup> Vishnu 17, 2; Yajnavalkya, 2, 121.

<sup>2</sup> Manu, IX, 209.

responsibility. The eldest brother, or whoever under exceptional circumstances took his place, was held strictly accountable for the administration of his trust. He was legally liable to deposition and punishment if he defrauded his younger brothers. If he attempted, without giving an equivalent, to take for his own any portion of the inheritance — the most common case of fraud upon co-heirs — he forfeited his additional share.

The same rule obtained as to community of property. The brothers contributed to the common fund, in the same manner as when their father was alive. But "what one brother may acquire by his labor without using the patrimony, that acquisition, made solely by his own effort, he shall not share, unless by his own will, with his brothers."<sup>1</sup> If a brother was able to support himself by his own occupation, and did not desire a share in the family property, he could withdraw from the family, receiving out of his share a small amount. But a brother, who, though able, would not work, was given a small sum as his share and then expelled.

Under certain circumstances the family estate might be divided. The father could of his own will divide the property among his sons, but could not be compelled to do so. If he adopted the life of a hermit, he would naturally make some such provision. But as wills were unknown, and there might be occasions when the father would wish to influence the division as far as permitted by the law, retirement to a life of contemplation and austerity was not the only circumstance under which division could be made by the father. In such division, he could not vary the proportion of the shares to offset self-acquired property by one or more of the sons. If after the partition — in which a considerable portion was always reserved by the father — he should have a son born to him, that son would take the reserved portion; or if any of the

<sup>1</sup> Manu, IX, 208.

other sons should become reunited with the father, such son or sons would share with the last-born.

After the death of the father, the sons could divide the property; though there are passages which seem to defer this power of division until after the death of the mother. This division might be made at the request of any one of the sons, and would in many cases take place merely because of the natural division of the family. There are, however, instances in which whole villages remained undivided for generations. The reasons for division were either economic, such as the ability of a son to support himself by independent occupation: family reasons, as the natural desire of a man to be the head of his own household,—a thing impossible while he lived with his elder brother, who represented the father: or religious reasons, for a special merit was attached to separation.<sup>1</sup> “Each of the brothers has to kindle the sacred fire, to offer separately the Agnihotra, the five great sacrifices, and so forth, and hence each gains separately merit.”<sup>2</sup>

The division took place upon what was originally a basis of equality. This was modified by a small increase of the share of the eldest son. According to Manu, there were three systems of additional shares.<sup>3</sup> By the first of these “the additional share deducted for the eldest shall be one-twentieth of the estate and the best of all chattels; for the middlemost, half of that [*i.e.* one-fortieth]; but for the youngest, one-fourth [*i.e.* one-eightieth]. Both the eldest and the youngest shall take their shares according to the rule just stated; each of those who are between the eldest and the youngest shall have the share prescribed for the middlemost.”<sup>4</sup> By the second rule, which applied

<sup>1</sup> Cf. Manu, IX, 111.

<sup>2</sup> Gautama, 27, 4. Cf. Manu, IX, 111.

<sup>3</sup> Hardly any point of law admitted of more variation than the proportions of these shares. To a very large extent, local custom probably prevailed.

<sup>4</sup> Manu, IX, 112 f.



when the brothers were equally skilled in their occupations, some trifle was given to the eldest as token of respect; the remainder was equally divided. By the third rule the eldest took two shares, the second son one share and a half, and all the younger sons one share each. Unmarried sisters were provided for by the brothers, each of whom contributed to such provision one-fourth part of his share.

These systems proceeded upon the supposition that the sons were of equal rank. But there might be sons by different mothers of the same caste as the father, sons of different rank belonging to the twelve orders, sons by mothers of different caste, or sons by an "appointed" daughter. In the first case, the son born of the eldest wife took precedence; the others by seniority.<sup>2</sup> In the second, failing the legitimate son, the son who had precedence inherited to the exclusion of all others, these latter being merely substitutes for sons.<sup>3</sup> In the third case, the custom is shown by an example of a Brahman who had a son by each of four wives, one wife being of each caste. The son of the woman of the Brahman caste took four shares, with some additions; the son of the Kshatriya wife took two shares; the son of the Vaisya wife took a share and a half; the son of the Sudra took one share.<sup>4</sup> The same proportions were applicable to all other combinations. The son of the "appointed" daughter was the heir of his maternal grandfather, taking the whole estate if there was no son to inherit. The circumstances connected with the appointment of the daughter were as follows: "He who has no son may make his daughter an appointed daughter (*putrika*), saying to her husband, 'The male child born of her shall perform my funeral rites.'"<sup>5</sup> "In case the father of the son of the appointed daughter has no other son, that son shall take

<sup>1</sup> Manu, IX, 116-118.

<sup>2</sup> *Ibid.*, 123-125.

<sup>3</sup> *Ibid.*, 165.

<sup>4</sup> *Ibid.*, 150 f.

<sup>5</sup> *Ibid.*, 127.

the estate of his own father as well, and shall present two funeral cakes.”<sup>1</sup>

The position of the son of the appointed daughter was very carefully protected. Should a brother to the daughter be born, the division was equal between the two. This might easily happen, because of the extreme youth in which marriages were contracted, especially by girls. “But if an appointed daughter by accident die without having a son, the husband of the appointed daughter may without hesitation take that estate.”<sup>2</sup>

Such are the principal rules of division and inheritance. If there were no heirs according to any of the methods so liberally granted from religious considerations, the estate of the deceased, as far as there was any separate property, would pass to the father,<sup>3</sup> to a brother’s son,<sup>4</sup> or to the agnates who were within the limits of Sapindas.<sup>5</sup> If there were no agnates or others entitled to the estate, the property escheated to the king.<sup>6</sup>

#### SECTION IV.—THE JUDICIAL SYSTEM

The whole body of civil law was divided into eighteen heads.<sup>7</sup>

- (1) Non-payment, or recovery, of debts.
- (2) Deposit and pledge.
- (3) Sale without ownership.
- (4) Concerns among partners.
- (5) Resumption of gifts.
- (6) Non-payment of wages.
- (7) Non-performance of agreements.
- (8) Rescission of sale and purchase.
- (9) Disputes between the owner of cattle and his servants.

<sup>1</sup> Manu, IX, 132.

<sup>2</sup> *Ibid.*, 135.

<sup>3</sup> *Ibid.*, 185.

<sup>4</sup> *Ibid.*, 182.

<sup>5</sup> Within three generations of ascendants or descendants.

<sup>6</sup> Gautama, 27, 42.

<sup>7</sup> Manu, VIII, 4 ff.

- (10) Disputes regarding boundaries.
- (11) Assault.
- (12) Defamation.
- (13) Theft.
- (14) Robbery and violence.
- (15) Adultery.
- (16) Duties of man and wife.
- (17) Partition of inheritance.
- (18) Gambling and betting.

Of these heads the sixteenth and seventeenth have already been discussed at some length. The eleventh to the fifteenth, as well as the eighteenth, could more properly be treated together in a work on criminal law. The first ten belong more properly to the scope of this work.

In the Hindu law the king was the supreme judge. He was assisted in the administration of justice, his chief duty, by a number of officers. There were ten members of the court, and their functions were carefully defined. Thus, the assessors investigated the facts, the chief judge gave the judgment, the king pronounced sentence, etc. Even in the case of crimes, the complaint was not usually brought by the king himself or by any of his servants.

The regal court, however, did not sit at all times, nor was it accessible, in a country so extensive, for all of the innumerable cases which would naturally arise. It would naturally take the position of a superior court to which cases were brought from local courts, or of one having exclusive jurisdiction in matters of a certain importance. Even the earliest law knows of the appointment by the king of a chief judge, who administered justice in the king's name and by his commission, of which the royal seal or ring was token. With him were associated other judges, who sometimes sat in banc and at other times separately. Appeal was taken from the associate judges, or assessors, to the chief judge. The legal system was eventually so extended that in every village there was a



judge, whose office was hereditary, but whose jurisdiction was very limited.

There was another judicial system of more practical importance than the royal system of courts. The royal government was oppressive when it was strong, humane only when it was weak. The royal system, introduced with many variations and elaborate distinctions of powers and duties, did not harmonize with the spirit of the race, although it was well adapted to enforce the royal demands and assist in the centralization of the government. But the villages had a judicial system of their own, at once familiar to and respected by them. The various trades and guilds had a similar system. The presiding officer of the popular courts or the courts of the various guilds held office either by election or inheritance, according to local custom. With him were associated three or five men. In these apparently private courts were settled the affairs of everyday life. The law here administered was the traditional law of the village or guild. In the older compilations and treatises on the law, the king was exhorted to sanction and enforce the judgments of these courts. In cases of grave crimes, or when the condemned party refused to obey the judgment of the local court, the court of the king was concerned with litigation. In short, the law of the corporations, which almost completely covered the life of the members, was immediately under the royal protection.

In the royal courts, the costs were divided between the parties to the suit. The costs increased in case of appeal, and the penalty inflicted by the first court was doubled if the appellant was defeated. There was another source of the royal income in the wager, which was made in the course of the trial.

The conduct of the proceedings was strikingly like that in the West. The process began with the lodging of a complaint, of which the judge made a preliminary investigation. Complaints from persons who had no legal responsibil-

ity—as women, or men under the *patria potestas*—were rejected. No complaints were heard in matters between father and son, man and wife, master and servant, or teacher and pupil. If the complaint was allowed, the defendant would thereupon be arrested, or subpœnaed to appear.

There were four divisions of the trial: First, the complaint, or declaration, presented in writing, or else reduced to writing in the court. The declaration was followed by the presentation of witnesses and proofs. Secondly, the reply, which was generally made within a reasonable time, and followed the declaration in its arrangement. There were four kinds of reply: denial; confession of guilt; confession and avoidance; and a plea in bar, where it was claimed that the matter had already been decided. Refusal to plead was regarded as confession of guilt. Thirdly, the proof, which was presented after the judge had decided on which party lay the burden of proof according to the pleas entered. The principal that obtained was that he who affirmed anything must prove it. The minimum number of necessary witnesses was fixed at three. Exception could be taken to their capacity to testify. They gave their evidence under oath; ordeals were also employed. Fourthly, the judgment and execution of sentence. The judgment was rendered in writing; it contained the declaration, the reply, and the main points of the case; it was signed by the judge and sealed with the royal seal.

In civil cases, the execution of the judgment of the court was more primitive than was the rest of the judicial process. It was a matter of self-help. The victorious plaintiff was compelled to collect his damages; but in so doing the law was on his side. If courteous and gentle methods failed, he was privileged to seize any article belonging to his debtor, and to hold it until the damages were paid. If this method failed, he could seize the person of his debtor and compel him to labor in his, the

creditor's, house. If the debtor was unable to labor, he could be confined at the cost of the creditor. Actual violence might also be resorted to by the creditor; he could kill or maim his debtor, confine his wife, sons, or cattle, or besiege him in his house. Here was the weak point of the Indian law. "By whatever means a creditor may be able to obtain possession of his property, even by those means may he force the debtor and make him pay. By moral suasion, a suit at law, by artful management, or by the 'customary proceeding,'<sup>1</sup> a creditor may recover property loaned; and, fifthly, by force. A creditor who himself recovers his property from his debtor must not be blamed by the king for retaking that which is his own."<sup>2</sup>

The divisions and arrangement of the eighteen titles given above are common to the older Indian law-books, but it would not be advantageous to follow them in the present work. The most important and characteristic matters, as far as the private law is concerned, and as that term is generally understood, may be brought under a smaller number of heads, of which the most important are as follows:—

Ownerships of immovables and movables.

Debts, loans, and interest.

Bailments.

Contracts.

The relation of master and servant.<sup>3</sup>

Liability.

Sale and partnership.

<sup>1</sup> The customary proceeding is either by killing the debtor's wife, children, or cattle, or by the creditor's fasting, sitting at the debtor's door. The last was usual throughout India, and is still in vogue in Nepaul. The creditor fasted before the house of the debtor, who was obliged to abandon all work and fast with him. This was frequently done when the creditor was a Brahman, for if the debtor outfasted the creditor, he would incur the enormous guilt of having caused the death of a Brahman.

<sup>2</sup> Manu, VIII, 48 ff.

<sup>3</sup> For obvious reasons, here treated apart from domestic relations.



## SECTION V. — OWNERSHIP

Much of the arable land in India has, at one time or another, been held in common by villagers. This was everywhere characteristic of the Aryans. In addition to the land held in common, as is shown by abundant evidence, there was land held in severalty, though there was always, on account of the custom of families to hold property in common, the tendency to revert to what was probably the older form of land ownership. The laws of India distinctly recognized private ownership, and the title which refers to disputes about boundaries would have no meaning unless there was a well-established custom of individual holdings. There generally remained in connection with the village a certain portion of pasture, or common, land in which all the villagers had the right to pasture their cattle; but the agricultural holdings were often private property, and adjoined the common land. The fields were usually enclosed by a hedge, and herdsmen were compelled, under penalty, to keep their cattle from entering the enclosures. Any damages to the crop, done by cattle, was "made good to the owner of the field."<sup>1</sup> The land thus owned could be leased, or farmed upon shares.<sup>2</sup> Land so treated was certainly not owned in common.

The law of India carefully distinguished between possession and ownership, and used entirely different words to express the different conceptions. Possession was indicated by the word *bhuj*, implying enjoyment or use: but ownership was expressed by words derived from the possessive pronoun *svam*, meaning *his*, or by substantives suggesting heritage or goods.<sup>3</sup> These distinctions must

<sup>1</sup> Manu, VIII, 241.

<sup>2</sup> Cf. Vishnu, 57, 16.

<sup>3</sup> The distinction between mere possession and ownership is well put in the *Smritisamgraha*: "If one holds anything in his hands, one does not become the owner of it thereby; is it not the case in stolen goods, that the property is to be found in the hand of another? Therefore, the

have arisen very early, and they indicate an early conception of the nature of ownership and how it might be established. There were the following ways of acquiring a title to property : inheritance, purchase, division (as of real estate owned by a family in common), occupancy or seizure of a *res nullius*, and discovery. To these may be added<sup>1</sup> gift, as to a Brahman, capture in war — peculiar to the Kshatriya caste — and wages, in the two lowest castes.

The legal conception of the origin of ownership in land was that of occupation and improvement. "Sages who know the past call this earth even the wife of Prithu ; they declare a field to belong to him who cleared away the timber, and a deer to him who first wounded it."<sup>2</sup> But this conception had little effect upon the affairs of everyday life ; it merely represented legal speculation.

The title of prescription, which grew out of occupancy, was very important. The distinction was that there must be an owner, and the possessor must for a definite time have continued in undisturbed possession. It was not sufficient for the possession to continue only during the absence of the owner, or during his legal inability to take action for the purpose of dispossessing the party in possession. By the general rule, the owner's claim to property was barred by ten years of continued peaceable possession. "What chattel an owner sees enjoyed by others during ten years, while, though present, he says nothing, that chattel he shall not recover. If the owner is neither an idiot nor a minor, and if his chattel be enjoyed by another before his eyes, it is lost to him by law ; the adverse possessor shall

right of ownership is to be known by science and not by mere perception, for otherwise no one could with reason say that the property of one had been taken by another. The legitimate methods of acquiring ownership, namely, gift, capture, trade, and service, according to the various castes, are each enumerated in science."

<sup>1</sup> According to Gautama, 10, 39.

<sup>2</sup> Manu, IX, 44.

retain that property.”<sup>1</sup> Title by adverse possession could never hold good against friends or relatives. The absentee lost his right of ownership only after fifty years of absence.<sup>2</sup> Against an heir to the family property there could be no adverse possession; he could always regain it from the other heirs.<sup>3</sup> Besides various conditions as to title thus acquired, common to Indian and other law,—*e.g.* that the possession be continuous, and that the possession be begun by an act not in itself unlawful,—there are various limitations as to the application of this principle. The property of princes, women, and certain others, could not be thus acquired.<sup>4</sup> Various objects could not be thus acquired at all. In the case of land, the principle of prescription was at first denied, as it was held that the land could not be taken from the family to which it belonged. The later law was disposed to look with more favor on a prescriptive title to land. Twenty years appeared to some lawgivers to be a sufficient time of possession to establish title; others considered possession for thirty and even sixty years necessary. Possession for three generations, or for what was regarded as the equivalent in time, for one hundred years, finally took the place of the shorter periods. One hundred years was regarded as the utmost extent of legal memory.

#### SECTION VI. — DEBTS, LOANS, INTEREST

As long as the family remained under the *patria potestas*, it was, in the eyes of the law, a corporation. Debts contracted by the head of the family for the benefit of the family must be paid, upon the death of the *pater familias*, by the heirs. Even if the family had separated, this

<sup>1</sup> Manu, VIII, 147 f.

<sup>2</sup> “Quotations from Narada,” 4, 7–10, in *Sacred Books of the East*, Oxford, 1889, vol. 33.

<sup>3</sup> Brihaspati, 25, 22–26.

<sup>4</sup> Gaut., 12, 38.



applied. In the same way the family — that is to say, the *pater familias* — might not rescind a reasonable contract in behalf of the family, made by one under the *patria potestas*.<sup>1</sup> But a husband was not otherwise responsible for debts contracted by his wife, unless the trade of the husband was such that it could be carried on only with the aid of his wife, as was the case with washing and acting.<sup>2</sup>

A debt was paid with the same formality as that with which it was contracted. Thus, if a loan was made before witnesses, it must be repaid before witnesses.<sup>3</sup> If a note or receipt for borrowed money was given, the note or receipt was returned or destroyed, or a written acknowledgment of the payment was given in lieu. In case of the payment of a portion of the sum for which a note was given, the amount paid was recorded on the back of the note.<sup>4</sup>

Loans and other debts were secured either by personal security or by pledge. Of these the latter was the more important. The pledge was deposited with the creditor. It might consist either of useful articles, as slaves or oxen, or articles not useful but valuable, as gold and precious stones.<sup>5</sup> In the first case, the use to which the pledge might be put was regarded as the equivalent of interest. There was evident here the same idea as that of the Grecian, Babylonian, and Egyptian antichresis, but it was not developed to the same extent. The creditor might not appropriate to his own use, for business purposes or otherwise, pledges of the nature of treasure.<sup>6</sup> Should the creditor injure, lose, or in any way detract from the value of the pledge, he was liable to the debtor, provided that the damage was due to his fault and not to some irresistible power. If the depreciation in the value of the pledge

<sup>1</sup> Manu, VIII, 166 f.

<sup>3</sup> Vishnu, 6, 1 ff.

<sup>5</sup> Narada, 1, 125.

<sup>2</sup> Vishnu, 6, 37.

<sup>4</sup> Vishnu, 6, 25 f.

<sup>6</sup> Cf. Manu, VIII, 150.

was not due to the fault of the creditor, the debtor was obliged to make good the deficit.

This use of the pledge was different from that under the Babylonian law. As has been before stated, anything taken on an antichretic mortgage was transferable to a third party. In India, the pledge must remain with the original creditor. In Babylon, it passed with the transfer of the loan. The explanation of this difference may be found in the more intense commercial activity of ancient Babylon, which produced a more complicated financial system.

There was one feature of the law of pledge which was strikingly connected with the law of interest; it was, that interest could not amount to more than the principal. As stated above, in the case of useful articles the use was regarded as the equivalent of interest. If in the course of time the value of the use amounted to twice the amount of the principal, the pledge was returned and the debt extinguished. One-half the value of the total use, being the amount of the principal, was regarded as interest, and the combined amounts paid the obligation in full. In both classes of pledge it was customary to designate a time at which the pledge, if unredeemed, would become forfeit. There were also stipulations to the advantage of the debtor.

The idea of the hypotheca, or pledged property still remaining in the custody of the debtor, was foreign to Indian law.

Personal security was given in a number of cases: for the payment of a debt, for the appearance of a debtor, for the delivery of a pledge or of property, for the solvency of the debtor, and for a large number of other conditions connected with trials and contracts. No one under the *patria potestas* could act as security. No member of a family still living together could act as security for another; each member was regarded in the eyes of the law as a part of one corporation.

If the debtor defaulted, the surety was liable to the creditor. When several parties acted as securities for one obligation, they could arrange their respective liabilities among themselves; they were not necessarily jointly and severally responsible for the whole amount. The surety might collect from the defaulting debtor at least twice the amount for which he had been made liable, and in certain cases even more.

The taking of interest was regarded with disapprobation, and the exaction of an excessive amount of interest was even looked upon as immoral, and the usurer held as no better than a thief. The punishment of the lender on interest, however, was spiritual, or rather, was to be meted out in a future earthly state. The Vaisya, or merchant, caste was allowed to take interest. "Neither a Brahman nor a Kshatriya must lend money at interest; but at his pleasure either of them may, in times of distress when he requires money for sacred purposes, lend to a very sinful man at a small interest."<sup>1</sup> The origin of this disapprobation and the evident reluctance to permit to the higher castes the taking of interest, no doubt lay in the original form of money or medium of exchange. In the time of the Vedas, this was cattle, and especially cows. The cow was constantly producing something of value. The milk was a species of interest, of which the creditor was deprived. Mere money could represent nothing of the kind. Indeed, it was in some respects considered less as a medium of exchange than as treasure.

Although the general rule was that interest ceased when the amount paid equalled that of the principal, the rate whereby duration of the period of interest was determined varied in different places and times, and there were many exceptions to the general rule. "In money transactions, interest paid at one time (not by instalments) shall never exceed the double of the principal; on grain, fruit, wool,

<sup>1</sup> Manu, X, 117.



or hair, and beasts of burden, it must not be more than five times the original amount.”<sup>1</sup> The legal rate of interest according to Manu was one-eightieth per month, or fifteen per cent per annum.<sup>2</sup> But when the security was inadequate, it might be higher. Stipulated interest beyond the legal rate, being against the law, could not be recovered.<sup>3</sup>

When a debt was due, it might be renewed by payment of the interest, or the interest and principal might be reckoned together as a new debt and interest paid on the whole amount.<sup>4</sup> In this way the rule which forbade compound interest was avoided.

Certain debts did not bear interest. Among these were wages due, gambling debts, debts contracted contrary to law or for immoral purposes, the price of goods bought, and fines due to courts. No interest was paid on the private and separate property of a wife, when it was used by her male relatives with her consent.

The marine loan was not unknown, though the peculiarity of the marine loan, that of the vessel being the security, is not referred to. “Whatever rate men fix, who are expert in sea-voyages and able to calculate the profit according to the place, the time, and the objects carried, that has legal force in such cases with respect to the payment to be made.”<sup>5</sup> The loss of the security or pledge — perhaps in this case the ship — was no release of the debt.

#### SECTION VII. — BAILMENTS

The law of bailments was an integral part of Hindu jurisprudence. The reason for the law is to be found in the insecurity of property and in the exactions of the State.<sup>6</sup> But the application of the law was extended to a variety of cases. Thus the bailment to a mechanic of property for work or repair, together with a great variety of other

<sup>1</sup> Manu, VIII, 151.

<sup>2</sup> *Ibid.*, 140.

<sup>3</sup> *Ibid.*, 154.

<sup>4</sup> *Ibid.*, 155.

<sup>5</sup> *Ibid.*, 157.

<sup>6</sup> Brihaspati, 12, 2.

species of bailments, was taken cognizance of by this law.<sup>1</sup> The bailee was responsible for the goods, but the varying degrees of responsibility do not, as in other systems, seem to have been classified. The bailee might use the property without the consent of the bailor. Although the bailee was liable for any loss or injury to the goods occurring through his fault, yet in the case of fire, theft, or overpowering force, or when he had given the bailor sufficient warning of danger, he was not responsible. While the law thus protected the bailee, it also aimed to prevent fraud on his part, especially in the appropriation of goods deposited with him.

Closely connected with bailment or deposit in point of origin was the custom of secreting property in the earth, and from this arose the law of treasure-trove. If hidden property were found by a stranger, and the owner was discovered, he could regain his property by paying one-sixth to the king. If there was no known lawful owner of the property, the king's portion varied according to the condition of the finder. A Brahman might retain the whole. Generally, however, "the king obtains one-half of ancient hoards and metals found in the ground, by reason of giving protection, and because he is lord of the soil."<sup>2</sup>

#### SECTION VIII. — CONTRACTS

The law of contract falls under the head of debt, as does the *nexum* in the early Roman law. It was therefore not independently developed. The principal points of interest are contained in the following passage from Manu : —

"A contract made by a person intoxicated, or insane, or grievously disordered by disease and so forth, or wholly dependent, by an infant or very aged man, or by an unauthorized party, is invalid. That agreement which has been made contrary to the law or to the usage of the vir-

<sup>1</sup> Narada, 2, 14.

<sup>2</sup> Manu, VIII, 35.

tuous can have no legal force, though it be established by proofs. A fraudulent mortgage or sale, a fraudulent gift or acceptance, and any transaction where he detects fraud, the judge may declare null and void."<sup>1</sup> Two other cases are of interest. "If after one damsel has been shown, another be given to the bridegroom, he may marry them both for the same price ; that Manu ordained."<sup>2</sup> There is here a much higher conception than that which obtained among the ancient Hebrews, judging from the story of Jacob and Leah and Rachel. The other case is that of an officiating priest, who, having been chosen to perform a sacrifice, abandons his work. In this case, the priest was to be paid in proportion to the work done. If the fees had been paid, and the work abandoned before being completed, he who thus violated the contract was required to procure another priest to complete the work.<sup>3</sup> This was regarded as a typical case, and the principle thereof was generally applied in all cases of contract. The case of non-fulfilment on the part of a servant of a contract to labor was of the same class, and is expressly stated under the title of non-payment of wages. As usual in ancient law, cases not expressly provided for were decided by analogy.

Wilful violation of a contract was not merely a civil injury ; it was a crime, and was punishable by fine, imprisonment, or even banishment. This applied to a contract under oath ; and doubtless to break such a contract was regarded as an offence against the gods, as was perjury. This law also applied to the forms of contract customary in village life.<sup>4</sup> In the case of the sale of a chattel not susceptible to rapid deterioration, the vendor might regain it within ten days. The purchaser might return it within the same period. After that period, both rights expired, and he who reclaimed or returned the property, unless the matter was of mutual consent, was fined as having violated his contract.

<sup>1</sup> Manu, VIII, 163-165.

<sup>2</sup> *Ibid.*, 204.

<sup>3</sup> *Ibid.*, 206 ff.

<sup>4</sup> *Ibid.*, 219 ff.



## SECTION IX. — MASTER AND SERVANT

The ninth title of the law, as it is laid down in the eighth book of Manu, is that of Master and Servant. It relates to a very primitive form of social life, as the whole matter is viewed in connection with herdsmen and cattle. The herdsman had charge of the cattle from sunrise to sunset. He was responsible for their safety during the day. If they were kept in the house of the owner at night, the owner was responsible for them during that period; otherwise the herdsman remained liable. Such loss as came from straying, accidents, or attacks by wild beasts was sustained by the servant, "if he did not exert himself sufficiently to prevent it." The cattle fed in the common pasture outside and around the villages. "If the cattle do damage to unfenced crops on that common, the king shall, in that case, not punish the herdsman."<sup>1</sup> The herdsman was liable to a fine if he allowed his cattle to do any damage within a fenced field. But "Manu has declared that no fine shall be paid for damage done by a cow within ten days after calving,<sup>2</sup> by bulls, and by cattle sacred to the gods, whether they are attended by a herdsman or not."<sup>3</sup> The owner of cattle was not responsible for any damage done by his cattle while under the charge of a herdsman. This responsibility of the herdsman is in marked contrast to the Western conception regarding the liability of servants.

A servant hired to perform a certain work transgressed both the civil and criminal law if he failed to fulfil his contract. If without good excuse, such as illness, he failed to perform the work, he was heavily fined and denied his wages. "But if he is really ill, and after recovery per-

<sup>1</sup> Manu, VIII, 238.

<sup>2</sup> Because they were supposed to be then utterly unmanageable.

<sup>3</sup> Manu, VIII, 242. Cf. Gautama, 12, 18-26, and Narada, 6, 10-17; 11, 28-41.

forms his work according to the original agreement, he shall receive his wages, even after the lapse of a very long time. But if he, whether sick or well, does not perform, or cause to be performed by others, his work according to his agreement, the wages for that work shall not be given him, even if it be only slightly incomplete.”<sup>1</sup>

#### SECTION X. — LIABILITY

The general law of liability was very full. In many cases, such as assault and trespass, a fine was imposed. This varied according to circumstances. “If a blow is struck against men or animals in order to give them pain, the judge shall inflict a fine in proportion to the amount of pain caused.”<sup>2</sup> This fine was paid to the king, and was independent of compensatory damages. “He who damages the goods of another, be it intentionally or unintentionally, shall give satisfaction to the owner and pay to the king a fine equal to the damage.”<sup>3</sup>

If domestic animals were killed, trees felled, or other irreparable damage done, the owner could recover the full value of the property. But if the damage was reparable, the measure of damages was the cost of restoration. Thus, in case of wounds of man or beast, the cost of the cure was all that was recoverable; so with injuries to houses or walls, or similar objects; only the actual expenditure required to put them into the original condition could be recovered.<sup>4</sup> Careful computation, based on average experience, was made of loss of metal in the working, weight of yarn gained in the weaving, and deterioration of clothes in the washing. Within the set limits there was no liability for loss; beyond them, damages might be recovered. Furthermore, damages done by dogs, horses, or monkeys could not be recovered, unless the owner of the animal incited it to the damage. The liability of car-

<sup>1</sup> Manu, VIII, 216 f.

<sup>2</sup> *Ibid.*, 286.

<sup>3</sup> *Ibid.*, 288.

<sup>4</sup> Vishnu, 5, 51, 59, 75 f., 106 f.

riers was carefully regulated. "If the harness broke in any part, or the axle or wheel was broken, although damages were due to the owner of the injured goods, there was no fine payable to the king."<sup>1</sup> But if the injuries arose from want of skill on the part of the driver, the *carrier* was fined. But "if the driver be skilful but negligent, he alone shall be fined."<sup>2</sup> If any "living being" was thus killed, a fine was imposed. Transport by water was under similar regulations. "Whatever may be damaged in a boat by the fault of the boatmen, that shall be made good by the boatmen collectively, each paying his share. This decision in suits brought by passengers holds good only in case the boatmen are culpably negligent on the water; in the case of an accident caused by the will of the gods, no fine can be inflicted on them."<sup>3</sup>

#### SECTION XI. — SALE

The sale of goods for the most part took place in open market. Here were always witnesses to the transaction. In this way, the purchaser saved himself from any suspicion of having stolen the goods. If the vendor was not the actual owner, but had unlawfully acquired the goods, it was no defence for the purchaser that he had bought in good faith. The goods must be returned to the actual owner, and the purchaser must recover as best he could the money which he had paid. Only in case of the purchase having taken place before witnesses was he cleared of theft. The owner of goods must bring witnesses to prove his title. Possession was *prima facie* evidence of ownership.<sup>4</sup> The purchaser of stolen goods, if he had bought them in good faith could, according to Brihaspati, under certain conditions oblige the owner to share the loss with him, by paying him only one-half the cost of the goods.<sup>5</sup> The

<sup>1</sup> Manu, VIII, 290 ff.

<sup>2</sup> *Ibid.*, 294.

<sup>3</sup> *Ibid.*, 408 f.

<sup>4</sup> *Ibid.* 199-202.

<sup>5</sup> Brihaspati, 13, 4-9.



details of sale were regulated by law. Not only must all weights and measures be examined and sealed every six months,<sup>1</sup> but the price of many things was fixed by law, or else "once in five days, or at the close of each fortnight, let the king publicly settle the prices for the merchants."<sup>2</sup>

The custom of giving a period of trial of articles sold led to the formation of important rules regarding earnest-money. The period of trial varied from one day, in the case of iron and clothing, to a whole month, in the case of female slaves.<sup>3</sup> Earnest-money was commonly paid, and if the sale was not completed the loss fell upon him who withdrew from the bargain. If it were the vendor, he forfeited twice the amount of the earnest-money.<sup>4</sup> In contract for delivery of goods, the goods were held at the risk of the purchaser if he delayed to receive them. On the other hand, if the vendor delayed delivery, he was responsible for them and for any loss caused by the delay.<sup>5</sup>

## SECTION XII. — PARTNERSHIP

The law of partnership appears only in the later Smritis. Manu makes only slight reference to it; but the proposition given is applicable to all other cases. The special reference is the law regulating the division of fees among a college of priests. The proportions stated are one-half, one-fourth, one-sixth, and one-twelfth; but it is not clear how these were to be apportioned among those who conjointly carried out the work.<sup>6</sup> A commentary on Manu explains the method of distribution as being in proportion to the work actually done. But the later law prescribed division of profit and loss in proportion to the amount of capital invested.

A member of a company or firm was responsible to the

<sup>1</sup> Manu, VIII, 403. <sup>2</sup> *Ibid.*, 402. <sup>3</sup> Narada, 9, 5 f. <sup>4</sup> Yajnavalkya, 2, 61.

<sup>5</sup> Gautama, 12, 42; Vishnu, 5, 127 ff.; Narada, 8, 4-10.

<sup>6</sup> Manu, VIII, 210 f.

other members for any loss occasioned by gross negligence on his part. Correspondingly, he received an increased share of profits for any special service done the firm by him. Thus, if he protected the joint goods or cattle from thieves, one-tenth of the property so saved belonged to him as a reward.

A mechanic was compelled by law to give to his apprentice as his share one-third of the amount received for work done. Other trades were also regulated by the law regarding their distribution of profits.<sup>1</sup>

#### SECTION XIII. — MODERN FORCE OF HINDU LAW

The law of India, as it is contained in the ancient law-books, has to a very large degree retained its force in modern India. The British Government at first made the not unnatural mistake of assuming that the law of Manu was the one system of universal authority. The first European students of Hindu law were misled by their instructors, who happened to belong to the religious sect that acknowledged the authority of Manu as a lawgiver. Furthermore, the mistake was made of assuming that the speculation of priestly legal colleges was in its entirety the actual law of India, when it was in fact in no case wholly in force in that country. The effects of these radical mistakes as to the nature and authority of Hindu law have been gradually corrected by the English as more accurate knowledge of the various schools has been acquired and as the mistakes of those who had been trained in a narrower system were overcome by the influence of broader theories concerning the nature and force of law.

The correction of the errors of early law officers has been materially accelerated by the mental characteristics of the Hindus themselves. In spite of their great attachment to their religious system, which, as with the Mohammedans, is also their law, the Hindu has the greatest

<sup>1</sup> See Narada, 3, 2-7; Brihaspati, 14, 1-32; Katyayana, 13, 1-6.

respect for all written law. By being committed to paper, law to him acquires a sanctity which makes its acceptance natural. The authority of comparatively recent legal systems in India is doubtless due to this fact, as well as to the regularity with which a written law can be enforced over large districts. The permanence and determination of written law does much to give it, in its most recent portions, the characteristics of a law which has been inherited from the remotest past. For this reason the Hindu law has been, in many minor matters, modified with but little opposition. The codification of large parts of the native law, and the establishment of a uniform system of courts, have necessarily brought that law into closer relation to the English law, although the Government guaranteed to the queen's subjects in India the enjoyment of their native laws. In spite of the good faith of the English officials, the time will necessarily come when still greater transformation of the Hindu law will be accomplished, by the same force that has in all ages effected such transformations.



## CHAPTER VI

### THE LAW OF GREECE

#### SECTION I. — HISTORICAL CONDITIONS

THE five great branches of the Aryan race which settled in Europe may be divided into two groups or classes. The northern group comprised the Teutons and the Slavs. The southern group embraced the Celts, the Latins, and the Greeks, or the various minor groups respectively known as the Celtic, the Italic, and the Hellenic. The affinities between the Latin and Greek languages are sufficient to show that these races must have remained close together for some time after the separation from the parent stock, and together gained acquaintance with many of the arts of life.

The Greeks regarded themselves as autochthons. Their history bore no record of migration from a distant land. Yet in contradiction to their belief in their autochthony stood the well-defined opinion that there had been earlier inhabitants of Greece, the Pelasgi. But the Greeks did not regard the Pelasgi as strangers. The two races worshipped the same supreme deity, Zeus, and although it has been thought by some that genuine Pelasgian families still lingered in Greece at a somewhat late period, the unification of the two peoples was complete at an early date. Was this a case of settlement and absorption? Was it a conquest of the land by an invading race? If so, whence came that race? To these questions the Greeks themselves could give no answer. It is probable that the questions were never seriously asked until modern times.

The modern historian, although removed by many centuries from the ancient chronicler, is able to read records which were sealed from the eyes of Herodotus and Thucydides. The mythology, the law, and, above all, the language of the past contain accounts of the early fortunes of the various races. According to a plausible theory, the Greeks, before they occupied the southern extremity of the Balkan Peninsula, dwelt in Asia Minor. Here they were one with the Pelasgi. Two great movements of the race occurred toward the northwest. The first of these was the Pelasgian migration, in which the pre-Hellenic inhabitants of Greece broke away from their fellows, crossed the Hellespont, and, passing around the northern shore of the Ægean Sea, entered Greece. The second migration was that of the Dorians, who entered Thessaly by much the same route, and, after remaining there for a time, pressed southward and occupied the Peloponnesus. This part of the migration was known to the Greeks of the historic period. The remaining body of Hellenes pressed toward the south and west of Asia Minor, and settled along the coast. Here was the settlement of the Ionians. From the eastern shore of the Ægean Sea the new colonists of Greece sailed westward to the land which was henceforth to be regarded as the only true home of the Greek. In later times, however, local pride reversed the relations between the so-called Ionian cities and European Greece.<sup>1</sup>

It is difficult to overestimate the importance of the Greek or Ionian settlements on the western shore of Asia Minor. The race here came into immediate contact with the Phœnicians, and from them learned the art of navigation. An active rivalry soon sprang up between the two races. The many commercial principles which the Phœnicians had received from Babylon and perfected in their own extended commerce were transmitted to their Aryan

<sup>1</sup> Curtius, *History of Greece*, Bk. I, chap. 1.

competitors. Everywhere the Ionians pressed closely upon the Phœnicians, establishing colonies on various parts of the Mediterranean coast line. Even prior to the time of the Trojan War, Greek commercial colonies were established in Egypt. Yet earlier, the Ionians had crossed the sea to Greece and planted themselves on the shores of their new home. They carried with them the arts which they had learned from their rivals and teachers. Their arrival in Greece opened a new era in their existence. The dull monotony of the Pelasgian life was ended forever. The vigorous, energetic, and keen-minded Ionians, with their powers quickened by wide experience and intense commercial industry, felt the added stimulus of a fresh mode of life, and thus historical Greece was founded.

The Greeks were always conscious of their unity. In spite of prevailing dialects, their language was one. These dialects were marked by the great division of Dorian and Ionian, together with the Æolian, which may be regarded as a remnant of the older Greek. Throughout the land, the customs and institutions were fundamentally the same. The religions of the people, though subject to variation and modification, were essentially one. In the prehistoric period, new deities were from time to time introduced by visiting merchants and sailors, though their shrines were at first limited to the seacoast. But as time wore on, these deities became the objects of a common worship of the people.

Notwithstanding all these bonds, there was no political unity in Greece. The country was for the most part made up of small states, or rather cities surrounded by a small tract of dependent land. In Ithaca there were other kings besides Ulysses. Attica, small as it was, at first contained no less than twelve towns, in each of which was a king or petty chieftain, and each regarded itself as an independent State. In Sparta, the conditions were somewhat different. But even after Attica was united by the



preëminence of Athens among the Twelve Cities, and had obtained comparatively extended territories, the constitutions of the various components were essentially those of cities. Herein was a fruitful germ for the political speculation of the Grecian philosophers; and the actual development of the law of Greece was profoundly influenced by the limited conception of the State. The independence of the individual, as opposed to the civil authority, could not be achieved. The complete subordination of the citizen to the requirements of the commonwealth was possible, and found its culmination in Sparta.

The extension of the colonial system by the central powers did not contribute to the law of Greece. In this there was a marked contrast to the law of Rome, which attained its perfection by adaptation to the conditions of other lands and by the necessity of finding a basis on which an extended foreign commerce might be conducted. The Roman sought to build up an empire in which every part should be organically united to every other part. The rapacity of consuls and proconsuls might treat the provinces as mere sources of wealth, to be exploited at will; but the national policy, even under the Republic, was that of assimilation. The rights of citizenship were conferred upon an ever increasing number. Local laws and institutions were retained, but modified by Roman conceptions, and in turn reacting in no small degree upon Roman law. Large numbers of Roman colonists settled in all parts of the empire. In short, the Romans established an organic empire, as distinguished from a tax-gathering empire, of which latter class Egypt and Babylon were the most ancient examples, and in more modern times the vast empire of Darius and Xerxes.

The empires of Athens and the other Grecian cities were modelled on the Asiatic plan. When once the race had risen to self-consciousness, there was little or no assimilation of foreign customs. Hence there was lacking

the *jus gentium* and all which that implied in the Roman jurisprudence. There was another hindrance to the formation of a *jus gentium*. The duration of the Athenian Empire, and that of all the Greek States, was very brief. The fortunes of the various cities fluctuated with startling rapidity, and no settled policy in advance of the first rude conceptions of empire could be established.

The law of Greece was based upon a foundation of inherited custom, much of which was common to all the branches of the great Aryan race. But in the different parts of Greece there existed marked divergencies, according as one or another conception of the State prevailed. In Sparta, the whole tendency of the law was to repress the independence of the private individual. There was no encouragement of commerce. Everything which might draw the citizen away from an exclusive devotion to the ends of the State, which were largely military, was discountenanced or restrained by almost every possible means. Such a conception of the relation of the individual to the community was not calculated to develop private law, if for no other reason than that under it little or no private law was needed. It could only create a constitution which included the whole life of the individual. But it left the individual with few or no rights in relation to his fellow-citizens. In Athens, on the other hand, there was not this complete subordination of the individual. There was not here that racial unity which made practicable the Spartan constitution. The masses did not live in subjection to a constitution; revolutions bore constant witness to the power of the populace. The commercial interests were very widespread. The influence of the common people was clearly felt. There was a law of freedom for the individual; a freedom certainly as complete as was possible in a race so fettered by innumerable traditions as were the Greeks, and greater perhaps than was compatible with the stability of the Athenian Empire.

## SECTION II. — DEVELOPMENT

The development of the law in the various countries was much the same, and three stages can be readily traced in such development, even in historic times. The first is that of the king, the second that of the oligarchy, and the third that of the code, or fixed constitution. The Homeric poems give a picture of the first stage, which undoubtedly prevailed as late as the period at which these poems were written. There was a divine *themis*. Its seat was in the mind and counsel of the gods. It included the eternal laws which governed human relations. It was manifested to men by the oracles, such as that of Zeus at Dodona.<sup>1</sup> But it was also given to men in the decisions of the kings. However much the king was guided by and under the influence of custom, his decision was regarded as the immediate inspiration of the gods. When he held his sceptre, he spoke with all the authority of Zeus, even as the latter held the title of king and father of gods and men.<sup>2</sup> If the king gave a wrong judgment, the disaster which ensued was regarded as evidence of the perversion of justice and the consequent wrath of the gods.<sup>3</sup>

The second stage of the development of law was the period of the oligarchies. This is well illustrated in the history of Athens, which was typical. There had been a council of old men surrounding the king; but with the degeneration of the royal families and their incapacity for regulating the affairs of state, the leading men gradually usurped the chief authority in the administration of justice, as well as all else. Thus there could no longer remain the pretence of immediate inspiration. The law was simply a body of established customs known to a number of men, and in accordance with which disputes were adjusted. The exclusive administration of the law

<sup>1</sup> Cf. *Odyssey*, 19, 296.<sup>2</sup> Cf. *Iliad*, 1, 233.<sup>3</sup> Cf. *Iliad*, 16, 385.



by the nobles, or Eupatridæ, and the rapid rotation in office among the nobles, rendered a consistent and energetic policy possible only as far as it was the policy of the class which monopolized the offices. Accordingly, the lower classes were heavily oppressed. The commercial class possessed nearly all the available coined money and controlled the rates of interest. There was not, as in Babylon, any system of credits in general use. The farmers became financially embarrassed and heavily in debt to the Eupatridæ; finally the entire landed property passed into the hands of the latter class. Dissatisfaction with the existing legal system became general. The people did not know the laws themselves, the processes by which they were carried out, or the result of those processes. Finally, with the aid of nobles leagued with them through self-interest, the populace forced the publication and practical codification of the law. These three stages may be also traced in the history of many Grecian cities less important than Athens.

Three great constitutions especially demand attention, those of Crete, Sparta, and Athens. Of these, the first was the least purely Greek in its composition and prevailing conceptions. Aryan principles were mingled with much which was derived from the laws of the Phœnicians and Egyptians. The constitution was the result of the Dorian invasion of Crete; the stronger families of native nobles were not entirely subjugated by the invaders, but employed by them as warriors. The training received by these troops was eminently well designed to maintain them at the highest point of efficiency then known. The commons, on the other hand, became little better than serfs.

*Sub-section A. Sparta.* — The constitution of Crete is less important for its actual contents than for its effect upon the more elaborate and systematic constitution drawn up by Lycurgus, according to tradition, for the Dorians of Sparta.

The Spartan constitution was a consistent expression of the subordination of the individual to the whole. This was made possible by putting aside to a large extent the sacral law, whereby the family organization had been maintained, and at the same time firmly maintaining the tribal system. In respect to the first of these measures, it is sufficient to mention the destruction of family life and with it the *patria potestas*. The State entirely monopolized this authority. In respect to the second, the Spartan idea of law, as expressed in the constitution, was the right of conquest and the order of things established by their forefathers at the time of conquest. "The spirit of all forms of the Spartan constitution was the Dorian idea of reverence and fear of the laws of the forefathers: the spirit of self-sacrificing obedience toward the State."<sup>1</sup> The whole system therefore became a course of education; indeed, the work of Lycurgus was known in antiquity not as a constitution, nor as legislation, but as a "discipline."<sup>2</sup> Furthermore, it was an order having permanent authority, and not the mere expression of the popular will. The Spartan constitution might be considered democratic, inasmuch as under it all Spartans fared alike and in its palmy days were by law financially on the same footing; but it was not democratic in the same sense as was that of Athens. The Spartans themselves were always in a small minority in the state which bore their name, and were able to maintain their position only by means of discipline and absolute rule. They alone possessed the right of the franchise, and were called upon to decide such matters as declarations of war, treaties of peace, or formation of alliances. This part of the constitution was the

<sup>1</sup> Müller, *Dorier*, 1844, II, p. 179.

<sup>2</sup> Cf. Livy, 39: 37. "*Quod leges disciplinamque vetustissimam Lycurgi sustulistis, quod muros diruistis . . . cum muri Lacedæmonis non ab Lycurgo, sed paucos ante omnes ad dissolvendam Lycurgi disciplinam exstructi sint,*" etc.

*psephisma*. Distinct from this was the *monothetma*, or the whole body of law inherited from the past and pronounced as *rhetra* by the lawgiving god Apollo by the mouth of Lycurgus.<sup>1</sup> "Such a constitution is not the expression of the will of the people; it is the form under which alone that will may manifest itself."

The Spartan constitution, which was also a body of laws, was never as a whole committed to writing; therefore very few fragments remain. Plutarch<sup>2</sup> says, "Lycurgus would never commit his laws to writing, and indeed a *rhetra* expressly forbade it. He was of the opinion that the most important points, and such as tended most directly to the public good, being imprinted by good discipline on the hearts of the young, would be sure to be retained, and would find a stronger security than would be possible by any compulsion, in the principles of action formed in them by their best lawgiver, education. And as for things of less importance, such as commercial or pecuniary contracts, and the like, the forms of which have to be changed as occasion requires, he thought it the best way to prescribe no positive rule or inviolable usage in such cases, willing that their manner and form should be altered according to the circumstances of the time, and determinations of men of sound judgment."

The great contribution of the Spartans to the jurisprudence of the world is the clear conception of a customary law, binding upon all, yet not depending either upon a divine revelation or the sacral order. The work of Lycurgus — who was undoubtedly a mythical personage and represented a complete spiritual movement — was regarded by the Spartans as the restoration of the *νόμιμα Δωρικά*, the laws which they ascribed to Aigimios.<sup>3</sup> The laws

<sup>1</sup> Cf. Leist, *Graeco-italische Rechtsgeschichte*, 1884, p. 544.

<sup>2</sup> *Lycurgus*, 13.

<sup>3</sup> Müller, *op. cit.*, II, p. 10 f.

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were binding upon all who were Spartans. The colonies which they founded came under the same law. Every generation received the law, was trained in it, and passed it on to another generation, and by that act gave it a new legislative force. By degrees the mythical connection with Apollo was stripped away, or rather was regarded as a transparent veil. The law was the law of the Spartans, with no reference to divine origin.

*Sub-section B. Athens.* — The Athenian conception of law was very different, even as the characteristics of the two cities were different. In the first place, there was not the same homogeneity in the governing class, or the same clearly marked divisions of the State, as in Sparta. The classes of Spartans, Perioeci, — or semi-independent ancient Achæans, — and Helots were not reproduced in the old Athenian divisions of Eupatridæ, Geomori, and Demiurgi. The original stock was made up of Pelasgians, who, from their situation, had escaped the influence of the Dorian invasion. Phœnicians had settled in large numbers on the coast. Carians, Cretans, Lycians, and Dardanians added to the confusion. Finally, a large Ionian element entered the land. Powerful foreign families settled and established themselves, and these became the founders of various petty local dynasties. The union of the twelve cities under the lead of Athens brought close together the diverse elements. The clash of local interests was for a time quieted by the part in the government of the whole people which was taken by the hitherto merely local leaders.

The most important legal invention, or modification, prior to the Solonian law reform in Athens was the establishment of the court of the Areopagus for cases of murder. According to the universal law, the offender was liable for the death which he had caused. The near kinsmen of the victim were in duty bound to avenge his death. It mattered nothing whether the killing was by

accident or with malice prepense. In both Greece and Rome, however, there existed the conviction that killing was not necessarily murder; it was recognized that there were other classes of manslaughter besides wilful murder. This theory was more completely worked out at Athens than at early Rome. In the former, there were three classes of killing. The first involved no blood-guiltiness, at least not to fullest extent. This class included justifiable and accidental homicide. The second class involved actual guilt, but the deed was considered as being done under the impulse of a sudden passion or insanity; here the culprit was held to be under the baleful influence of Ate.<sup>1</sup> The third class also involved guilt, and included all killing done with malice aforethought; this was killing with *hybris*, or murder which neither man nor God could forgive. The second class of killing, or murder in momentary anger or when the culprit was not in full possession of his faculties, admitted a penalty of compensation instead of death. In the earliest period the form of this compensation was that of servile labor for a term of years, generally eight.<sup>2</sup> In later times the compensation, or "were-geld," was given in money.

There remained the difficulty of decision as to whether a given case of killing was under the influence of Ate or with *hybris*. If the former were the case, the culprit had the right of escaping death by the payment of a "were-geld." A court was needed to protect him in this right. In early times this protection was the duty of the king and the gathering of people.<sup>3</sup> The expiation of a homicide for which were-geld was allowed was, in part, a matter which concerned the gods; and the procedure of Delphi was generally followed. The Areopagus at Athens was the most important court which took cogni-

<sup>1</sup> Cf. Otfried Müller, *Æschylos Eumeniden*, 1833, p. 136.

<sup>2</sup> Cf. Müller, *Dorier*, I, pp. 237, 322, 419.

<sup>3</sup> Cf. the description of the shield of Achilles, *Iliad*, 18, 497 ff.

zance of such matters. The importance of this court was all the greater in that the result of its institution was not only the distinction between the various classes of homicide, but also the assumption of the right of passing sentence and enforcing its execution by the officers of the State. This was a revolution of first-class importance in the conception of law, and marks the beginning of criminal as distinguished from civil law.<sup>1</sup> In the course of Solonian reform the Areopagitic senate was retained, and its powers extended. It took cognizance not only of homicide, but of the violation of laws in general. It exercised a censorship over men's morals and occupations, and punished the idle and dissolute. By its work, the conception of a crime as distinguished from a civil wrong was clearly brought before the eyes of men.

The circumstances which brought about the legal reforms of Solon were the natural and inevitable result of the differences of interest among the heterogeneous population. The commercial interest was exceedingly powerful. The nobility were intent upon becoming landowners. The peasants were ground between these two millstones. The primitive regal constitution was adverse to any democratic principle. The king and the Eupatridæ administered justice. The king sat in the market-place, the court of the Areopagus upon the adjacent hill of Ares. Neither had at heart the welfare of the classes with which they had nothing in common. The abolition of the royal authority did little to alleviate the tension between the upper and the middle and lower classes. "All the advantages of the political changes were on the side of the Eupatridæ; the demos was here, as everywhere, a loser by the cessation of the monarchy."<sup>2</sup>

The attempts which were made to resist the power of

<sup>1</sup> For a detailed account of this development cf. Leist., *op. cit.*, pp. 334-423.

<sup>2</sup> Curtius, *op. cit.*, I. p. 335.



the nobility were met by the code of Draco (620 B.C.). The aim of this code was to retain, in the form of written law, the constitution which had caused the general dissatisfaction, but which the nobles were loth to abandon. There was here, however, the same significance as in the publication of the Roman Twelve Tables. The law was no longer to be a monopoly of the nobility, to be administered in the interests of only one party. The punishment of the offender was to be no longer merely at the discretion of the archon. In itself, the new code was no more severe than the customary law. It was felt as harsh only by those who were disappointed in their desire of obtaining a radical change in the legal system. There was a twofold gain: the end which was put to arbitrary rule, and the establishment of a college of fifty judges, or Ephetæ, who held court and decided cases according to the law.

The Draconian Code was too evidently only a prop to the failing power of the Eupatridæ. The confusion following the attempted revolution of Cylon, the expulsion of the Alemæonidæ, the merely temporary alleviation gained from Epimenides of Crete, the diversion caused by the conquest of Salamis and the Delphic War, — all these combined to give the opportunity to Solon to introduce his reforms in the constitution of the city and in the code of laws. The confusion which had prevailed had been largely caused by the indebtedness of the small proprietors. The traditional law allowed execution for debt to be made on the person of the debtor; and thereby many freemen had been enslaved and even sold out of the country. Solon put an end to this extreme practice. No man was liable to be sold into slavery or reduced to serfdom because of indebtedness.<sup>1</sup> A limit was set to the rate

<sup>1</sup> In this respect Athens was far in advance of the other parts of Greece, where the old law of execution on the person of the debtor remained constant. Cf. Diodorus Siculus, I, 79.

of interest, and usury, or extortionate interest, was prohibited. As a further measure of relief, the standard of the currency was changed, with a resulting reduction of debts by twenty-seven per cent.<sup>1</sup> Furthermore, the citizens were arranged according to a new classification — known as the timocratic — in which the amount of taxable property was the basis of differentiation. This classification wholly disregarded the older division into *gentes* and *phratries*. Members of the same *phratry* might find themselves in totally different classes. This was only one of the blows struck by Solon at the gentile system, which had been retained from remote antiquity and at Rome survived for many centuries.<sup>2</sup> Certain offices were open only to the higher classes, though all took a part in the civil government. Even the *thetes*, or laboring class, had political rights, though a member of this class could not fill an executive office.

The most radical change in the law which the Athenians had held in common with the other Aryans, concerned the family and the disposition of family property. Hitherto the property of the childless man had passed to his kinsmen. Hereafter a man might, in default of issue, choose an heir and adopt him as his child.

The testamentary legislation of Solon was opposed to all the traditional Greek conceptions, whereby succession to property was connected with the proper performance of the funeral rites. It was a powerful agent in subverting the ancestor worship which in Aryan lands, including Greece and Rome, was for long the chief form of religious observance. The will was probably in the form of a document executed by the deceased. The legitimate

<sup>1</sup> This shifting of standard was never repeated in the later days of Greece. The same weight and fineness was maintained. Cf. Grote's *History of Greece*, 1854, III, 155 ff.

<sup>2</sup> For the whole subject of the Solonian classification see Boeckh, *Staatshaushaltung der Athener*, Bd. III, c. 5; also Aristotle *On the Constitution of Athens*, tr. by C. Poste, London, 1891, p. 96.

son might not be disinherited, nor might the testator infringe the rule of equal division of property among the sons. The new law merely released a man from the obligation of leaving his property to his *phratry*. It is very significant that a will could be set aside on the ground of undue influence or compulsion. If there were no sons, but one or more daughters, these succeeded to the property; but the father could by will name the kinsman who should marry the daughter.<sup>1</sup> Or, with the consent of the daughter, he could make other distribution of his property. The law of intestate succession was as follows: the father was the nearest heir; in case of the non-survival of the father, then the brother, or brother's children *per stirpes*, sister or sister's children *per stirpes*. Cousins on the side of the father stood next in line; after them those on the side of the mother. All of this was in remarkable contrast to the Roman agnatic succession, which latter was maintained for several centuries subsequent to this period.

By this legislation Solon, as Plutarch says, made the estate of a man truly his own. But on the other hand, a son was, at least to a certain degree, freed from the *patria potestas*. He was a future member of the community; as such, the State had a right to him, superior to that of his father. The son, being born a free citizen, could not be sold as a slave. He could not be disinherited without just cause. He was not obliged to support his aged father, unless the latter had educated him to earn his living by an honest trade. In short, Solon struck a direct blow at the fundamental principle of Aryan society. He deprived the father of rights which had always been considered inherent in fatherhood. He treated father and son as independent individuals, whose respective claims were based upon the fulfilment of their respective duties.

Important as were the changes in the law, however,

<sup>1</sup> Cf. the Hindu law of the "appointed daughter," p. 138.



they did not in themselves make up the greatest result of the Solonian reforms. This was found in the revolution which was thus effected in the conception of law. The mere writing of the law was not so significant, for divine revelations could be committed to writing, and the idea of mythical origin and authority was not thus of necessity taken from the law; but the importance lay in the setting forth of the law as the will of the people or the State, and therefore susceptible of alteration. The laws of Solon claimed no divine origin. They stood as the product of human reason. They were those measures which commended themselves to human intelligence as likely to remedy definite evils and to promote desired good. They were the consensus of public opinion. When Solon was asked whether he had given to the Athenians the best laws, he answered, "Yes, the best they would accept."<sup>1</sup> They were not perfect; but they marked a distinct and great advance in theory and practice. With their birth was born statute law, as opposed on the one hand to the traditional or customary law, and on the other to the supposed revelations of the gods. x

But in connection with this, the conception of the law in itself, was the conception of the law in its relation to the individual. Every complaint of the violation of a right was referred to the court and judges appointed by the State. The individual was protected by the courts in the enjoyment of his rights. This broad conception was the result of the Solonian reform, and the universal recognition of the importance of the work of the sage was more due to this than to the completeness of the code which he introduced. But that code was a model which might profitably be imitated; whereas the Spartan system was impracticable except at the cost of all that beautified and enriched life.

There were two influences which bore upon the growth

<sup>1</sup> Plutarch, *Solon*, c. 15.

of law in Greece, and especially in Athens. One of these, the conception of law as the product of human wisdom, has already been mentioned. It was the ground and basis of all subsequent legislation, and made plausible the frequent demands for a revolution in the constitution of the State, or a radical change in existing laws; for whenever calamities fell upon the State, the easiest explanation was found in bad legislation. A change in the existing code might save the State. This was a radically revolutionary principle which bore much fruit.

The other influence was a conservative one. This was philosophical speculation. The questions of right and wrong, discussed with so much acumen in the Socratic schools, repeatedly turned upon the relation of an act to the law. Was it right because it conformed to human law, or were both it and the law to which it conformed right because they conformed to an eternal and divine law? Here was the place where morality and law parted company; not that they were opposed to one another, but that their methods were different. Philosophy considered the eternal relations of the act; law, the temporal. Philosophy was here tending, though doubtless unintentionally, to a more primitive conception of law, to the thought of *themis*. Law was standing at the threshold of the vast edifice it was about to enter and possess.

The legislation of Solon was partly in the form of a code of laws which was open to the inspection of all men, and the example thus set was followed in nearly all parts of Greece. But it must not be supposed that the whole body of law was reduced to writing and codified. As before, a very large part was the customary law. Thus, the commercial law was principally the customary law of the West, introduced by the Phœnicians but originally derived from the Babylonians. It may seem strange that, after the example set by Solon, the many laws should

not have been systematized and reduced to writing, and made the object of study in their exact form. Even in the period of their greatest intellectual activity, this was not done by the Greeks. The explanation of this phenomenon is that the national thought still regarded law chiefly as a matter of precedence; and, of all departments of law, procedure is more than any other a matter of custom. It is that part which is most easily learned and most tenaciously retained. Even after all meaning of ancient methods and ritual forms has been lost, they are clung to as of vital importance.

The Greek populace was a constant witness of the contests which took place in the dicasteries. Great numbers of Athenian citizens were constantly employed as jurymen in the Helæa, or as arbitrators. Apart from the duty of being present, the splendid displays of oratory which constantly took place would have called numbers together. The city, even in most palmy days, was very small, and no considerable number of the citizens could remain ignorant of the important principles of the law and procedure. Curiosity as to the intricacies of the law was not present to impel scholars to careful study of its principles; consequently, there was no systematic and logical development of the law. When some great grievance, for which an adequate remedy did not seem to exist, had grown up, it was easier to enact new law to fit the case, or to look to some leader to right matters. After the establishment of the Macedonian ascendancy, there was abundant opportunity for the Greek mind to turn from the practical questions which came before the dicasteries to speculation upon the nature of law and the construction of a logical legal system.<sup>1</sup> But the whole tendency of Greek thought was towards philosophy, and philosophy came no nearer to the question of law than in speculating as to the ideal constitution of the State or the relations

<sup>1</sup> See Sheldon Amos, *Science of Politics*, p. 78 f.



of the individual man to the whole body of mankind.

The immense improvement in the affairs of Athens which was brought about by the legislation of Solon caused the later orators, philosophers, and historians of Greece to trace all the law of Athens back to him, their greatest lawgiver. The various cities of Greece soon followed the example of Athens, until it became almost impossible for a Greek to conceive of any important or venerable legal institution as not having been established by that legislator whom he regarded with reverence and gratitude. But though Solon might be said to have laid to a large extent the foundation of the future greatness of Athens, he left a vast amount to be done by future generations. His laws, however numerous, were without careful system or classification. Some were evidently designed to meet pressing needs of the present. Others were general devices intended to benefit the State in the future and to obviate the ill results of customs which had not as yet become embarrassing to society.

The general course of the legal development of Greece might with reason be said to have been the gradual progress from a religious to a political conception of law. The early conception of law — *themis*, that which the gods had ordained — remained long after the origin of specific laws was known. The connection of legislation with the oracles was always a natural thought to the Greek. The whole judicial process was put under the protection of a divinity by the oaths which were administered at the trials. As long as the kings dispensed justice, the sacral element was prominent. The king represented in the State that which the *pater familias* represented in the family. In every Grecian city there was a Prytaneum. This contained the altar of Hestia, and served as the hearth of the whole race or tribe. When the king was definitely set aside as the leader of the whole State, or retained merely

as one of a number of coördinate functionaries, the connection between the religious organization and jurisprudence was rapidly approaching its end. He who administered justice was no longer he who watched over the sacra of the State. The establishment of popular courts completed the revolution. The question of expediency was the main question in every law, and the judgment in individual cases was the wisdom of the multitude. Divine inspiration may be revered when it is confined to one person; but when it is claimed by a large number acting conjointly, the claim fails to command respect. The religious condition of Athens was adapted to hasten the secularization of the law. The religious beliefs of the people greatly varied. The State religion was largely of a political character. The ritual and the sacrifices, as well as the practices in connection with the dead, — which in all Aryan nations were of supreme importance, — tended to the excess which always follows individual caprice. The Solonian laws attempted to regulate these matters. At once the law and the popular religion, that which appealed to the people, came into conflict. The result was the separation of the two elements of the life of the community.

### SECTION III. — JUDICIAL PROCEDURE

*Latin process*

Just as it is impossible to give in one concise account the laws of all the Greek cities with their multitudinous variations, so the forms of procedure cannot be stated in any terms which apply to all the courts of Greece. It is necessary to consider solely the case of Athens; not because that city was typical of all Greece, but because there the refinements of legal procedure were most marked, and the results obtained by the city's legal thought were perpetuated with its literature and art. The course of legal procedure is abundantly illustrated by the speeches of the Greek orators, and surprising resemblances to some modern methods are to be met with in the orations of Demosthenes.

The whole course of the ordinary suit at law, as carried on at Athens after the Solonian reforms, may be divided into five stages : the summons, the appearance before the magistrate, the preliminary hearing or anacrisis, the trial before the dicastery, and the judgment.

Every suit began with a summons served upon the defendant, citing him to appear before a magistrate to answer to a complaint. The summons was generally served in person by the plaintiff, who took with him two or three witnesses. If the defendant was an alien, or there was probability that he might flee the country in order to avoid trial, the plaintiff could arrest him and bring him before the magistrate or polemarch. The defendant was thereupon bound over, by giving bail, to appear at the time set after the service of summons — generally five days. In default of bail he was committed to jail until the day set for his appearance.

The appearance before the magistrate was designed to prevent frivolous or vexatious suits. The plaintiff formally entered his complaint and deposited the court fees, which varied in proportion to the amount at issue. If the defendant failed to appear, the case at once went against him by default, unless he could afterward show sufficient cause for his absence. After being presented, the complaint was carefully examined by the magistrate, and if it contained valid grounds for an action, it was placed upon the docket for the next stage of the trial, the anacrisis, the day for which was fixed by lot. The parties might at any stage of the proceedings refer the whole case to arbitrators (*diatetæ*); but at no time could the plaintiff, without mulct, abandon his case.

From a juristic standpoint the anacrisis, or preliminary hearing, was the most important part of the suit. It was here that the real legal conflict took place. Here again the case might go against either party by default, but might be continued at the request of either, if reasonable



cause were shown. The plaintiff entered his declaration, containing the facts complained of. In reply, the defendant might enter several pleas. He might enter a plea in abatement to the person of the plaintiff, alleging that the latter was incompetent to bring suit, either as not being *sui juris* or as otherwise disqualified. Thus Æschines, in the suit brought against him by Timarchus, endeavored to show that he should not be called upon to answer, because Timarchus had been guilty of such crimes as to make him infamous and debar him from bringing suit. This was, in the strict sense of the word, the *antiparagraphhe*. It was closely related to the "cross action," which was also known. The danger in entering the antiparagraphic plea lay in the fact that failure to establish the alleged point resulted in the imposition of a heavy fine (*epobelía*), which went to the plaintiff—the same fine which would have been paid to the defendant if the prosecution of the suit had been abandoned. In addition to this form of plea, there were many others. Besides peremptory, there were dilatory pleas, such as to the jurisdiction of the court, or to the form of the declaration. No cause, however, could be lost merely on the ground of a technicality. The declaration could be amended, and the advantage of a plea based upon a technicality was very doubtful. It generally prejudiced those before whom the cause was brought for trial. It was possible, and indeed customary, for the defendant to deny the facts alleged against him; the hearing at once proceeded with the examination of the parties. Witnesses were called on both sides. Their testimony was taken, reduced to writing, and sworn to by them. Affidavits were submitted, as well as all documents, or duly authenticated copies of documents, bearing on the case. In short, everything of importance relating to the case was brought forward. All evidence, however, was not admitted. The testimony of an avowed enemy or intimate friend of either party was excluded.

When the evidence was all in, the magistrate, if the testimony was overwhelmingly in favor of one of the parties, might at once settle the case. Usually, however, all evidence of every sort was sealed up, and the case was sent to the dicastery. After the hearing, no further evidence could be submitted, and the dicastery had before it no more than had been produced at the anacrisis. ✓

The trial before the dicastery was more important from a political than from a legal standpoint. The body which heard the case was frequently very large, and was made up from those who had sought the position of jurymen. It was no unusual thing for many hundreds to sit at the trial of a case, and even a thousand was by no means a rare number. Politically, such a jury meant that the whole people rendered judgment. Legally, the trial was little more than a display of forensic oratory. The speakers on each side endeavored by every rhetorical and histrionic device to win the favor of the dicasts, who had two duties to perform: the merits of the case were to be decided, and the amount of damages, if any, was to be assessed. || =

The Athenian law left the execution of a judgment in a civil case largely to the successful party. He might not imprison or enslave the defendant, yet the principle of self-help enabled him to seize the latter's goods. Here, as in all ancient law, was the chief defect in the civil process. It was the case in India, though in aggravated form. It was also the case in Rome. In Athens, the execution was mitigated by its restriction to property. This was not so in Rome, where, in the early law, the principle of execution was personal.

The substantive law of Greece presents fewer refinements than does the adjective law. In its law of domestic relations it is but slightly developed, and presents many archaic features; but the commercial law shows many affinities with the juristic inventions of Babylonia.

## SECTION IV. — DOMESTIC RELATIONS

From the earliest time of which we have record, marriage in Greece was monogamous. It may well be that this limitation of the marital bond, which the Greeks shared with the Latins, was, as is thought by Ihering,<sup>1</sup> a result of the migrations. But the presence of concubines in the house was tolerated by custom. The forms by which marriage was effected retained traces of the earlier civilization. In Sparta, marriage by capture was imitated in the ceremony: but the resistance offered the suitor by the friends of the bride was merely formal, although custom demanded that it should be given every appearance of being actual. In Athens, marriage by purchase seems to have continued, as in Rome, as the survival of a genuine sale. But the validity of the marriage did not depend upon the sale, as the husband did not acquire complete proprietary rights.

The wife's position in the household was one of great subordination. She lived in seclusion, and enjoyed but a very small part of the liberty which was the lot of the Roman matron, although the latter was theoretically under much greater legal subjection. The Athenian wife was not allowed to own any property. Her dowry was enjoyed by her husband as usufructuary; but it was returned to her upon the death of her husband, and if she was childless she returned with her dowry to the home of her parents. If she had borne children, she remained in the house of her deceased husband. The conception of the family was in this radically different from the Roman idea. The woman did not in Athens pass by marriage under the authority of a *pater familias*; she was not *in loco filiae*.

The Greek marriage was dissolvable by divorce, and here, as in all ancient and many modern countries, the right of the husband to divorce the wife was far in excess

<sup>1</sup> *Op. cit.*, 338 ff.



of that of the wife to repudiate her husband. The wife, however, was protected from divorce at the mere caprice of her husband by the law which provided that he should restore the dowry; but he was not obliged to do this if he divorced his wife because of adultery.

The Spartan matron enjoyed much greater freedom than did her sisters in other parts of Greece. She was all her life accustomed to regard herself as a part of the State; and her duty and privileges as the mother of Spartan youths gave her a standing she did not elsewhere attain. In this State marriage was not a matter of individual choice; all men and women were expected to marry and rear families. The elderly bachelor was punished by the State, and was not allowed the honors generally paid to the aged in Sparta.

The status of the Athenian family and inheritance was based upon religious conceptions, almost as entirely as was the case in India. Ancestor worship was the form of religion which longest held possession of the hearts of men. The main end of marriage was the necessity of providing an heir, who might perform the sacred rites. If offspring were not begotten in marriage, there was provision against failure of the rites in the custom of adoption. This might take place either during the lifetime of the adopter, or by will after his decease. If a man died both childless and intestate, the State, rather than allow the family rites to cease, appointed to the deceased an adopted son who should perform filial honors to his memory. If a man were adopted during the lifetime of the adopter, he enjoyed all the legal rights of a son; and should a child be afterward born to the adopter, the adopted son shared equally in the inheritance. (Adoption, however, being for the purpose of supplying a need, was not allowed where that need did not exist; only in default of male issue could the right be exercised.)

*Adoption*  
*intestate*

## SECTION V. — COMMERCIAL LAW

The commercial law which arose in Babylon and was diffused by the Phœnicians throughout the Western world, appears in a great number of particulars in the commercial law of Greece. The Phœnicians were to a large extent supplanted by their pupils and rivals. The legal institutions, which the merchants of Tyre and Sidon obtained from Babylon, were developed and perfected by the Athenians.

The Greek cities fully appreciated the value of commerce as an element in the prosperity of the State, and they sought in every way to further the interests of the trader. Abroad, a system of consuls, or proxeni, guarded his interests. Commercial treaties, regulating the form in which suits might be brought by aliens, were concluded between the various States. At Athens the foreign trader, in a commercial case, might bring suit in person, although in cases not commercial he had to be represented by a citizen. At home, the trader was in many respects favored. He was afforded facilities for the collection of debts; his rights as creditor were strictly guarded, and delinquent debtors were severely punished.

In order to carry on commerce, a banking system, closely resembling that of Babylon, was devised. The bankers were at first money changers. They received sums on deposit, and paid on draft. They frequently had charge of large financial transactions, and received and disbursed money in furtherance of great commercial undertakings. But the banking system was carried no further than was that of Babylon. There was no general system of exchange among the different cities and colonies. When voyages were made to distant points, it was necessary to carry actual money, in order to purchase a return cargo.

The banker was a receiver of money, and also per-

formed certain *quasi*-notarial functions, being often called upon to witness contracts. In connection with receiving and investing money, he was often required to preserve deeds and other valuable documents. In Greece, as in Babylon, the functions of the banker, were often performed by the priests. The sanctity of the temples, and the probity of the priests, formed sufficient ground for intrusting treasure to their guardianship. Their ample revenues were insurance against insolvency; and probably in no other hands was there so much available capital.

The sea commerce of Greece — the most extensive form of that country's trade — was carried on in much the same way as was the commerce of the Semitic traders. The trading voyage to some distant land was an undertaking likely to be very profitable. The ship went from port to port, and the traders were able to dispose of their goods with little difficulty, and to collect a remunerative cargo for the return voyage. Though the risk was great, this was a favorite form of investment. Bottomry loans were frequently made at a high rate of interest, varying from twenty per cent to thirty per cent. As in Babylon, the security given was the vessel, or the vessel and cargo, and with the loss of the ship the loan was extinguished.

As might be expected, the *antichresis* of Babylon and Egypt appears also in Greece; and the *hypotheca*, or mortgage as distinguished from mere pledge, is of importance because of its relation to the law of Rome. In this form of loan, the article forming the security remained in the possession of the borrower, who retained its use but might not dispose of it. No attachment might be levied upon it by a third party until the loan had been returned.

The law of Greece has not exercised upon other legal systems the same influence as have those of Babylon and Rome. It was unable to develop the original Aryan conceptions, and therefore failed to produce a systematic jurisprudence. Its relation to other forms of European law



consisted in the transmission of the perfected juristic conceptions begotten of the commercial life of Babylon and Phœnicia ; and when those conceptions became integral parts of the Roman law, the importance of Greek law disappeared.

## PART II

### *THE DEVELOPMENT OF JURISPRUDENCE*

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#### CHAPTER VII

##### EARLY ROMAN LAW

###### SECTION I. — HISTORICAL INTRODUCTION

THE Roman Law was the greatest product of Roman genius. That which art, literature, and philosophy was to Greece, jurisprudence was to Rome. The position which Greece has held in the history of the culture of the world was in no greater degree owing to its artistic triumphs than was the corresponding position of Rome to its juridical triumphs. Each nation thus found appropriate expression for its deepest thought and most cherished ideals. Each nation was able to preserve much of the culture of its time, and to transmute that culture into that which the world has ever prized as choicest heirlooms. In spite of the philosophical training of the people, the law of Greece was unable to attain any abiding significance or general adoption. The existing political system rendered it impossible to extend the law of one city to others, except in rare instances. In consequence, there was not that testing and sifting process by which the law might have been reduced to a few principles, fundamental and capable of universal application. If a law was found to be in-

convenient, it was abolished by a popular assembly, and in its place was substituted one which was as yet untried and which was liable to produce mischief. On the other hand, the scientific development of the law of Rome was favored by nearly every circumstance by which that of Greece was retarded. Added to all other conditions was the great duration of the law as a living system, allowing the jurists opportunity to draw ultimate conclusions from the original principles. The result has been the object of the gratitude and admiration of the world; a work of art in the beautifully adjusted parts which form the great system, in its way comparable to any product of the æsthetic fancy. The art of Greece has made a less permanent and deep impression upon the world than has the law of Rome. Grecian philosophy and poetry have formed the taste of many generations, but the law of Rome has moulded the lives and controlled the fates of myriads of men who have had no knowledge of Grecian art, nor taste to appreciate it had they known it.

The prominence of Roman Law among all the legal systems of ancient and modern times was due not merely to the genius of the Latin race, but also to the relation in which that race stood to the rest of the world. By origin it was one of the Aryan family of nations. It inherited the customs and traditions which have left their mark upon the institutions of India as well as those of England. But it stood in such relation to the highest Western civilization as to gain therefrom all the best which this had to offer. The law of the race had its birth in that fertile and diversified country which lies to the west of the Apennines. The races which occupied that favored tract were within easy communication of the great Phœnician State of Carthage. Thence they could obtain those juristic principles which had been slowly elaborated in the East. The decaying fortunes of Babylon and Egypt in no wise hindered the transmission of the laws of those nations.



The commercial customs which had been known on the banks of the Euphrates from an immemorial antiquity became, through the Phoenicians, the commercial law of the whole known world. Of many of these Rome was, through Carthage, possessed from the earliest period. The conquest of Greece in 197 B.C. continued and increased the influence which Attic culture had long since established in Latium. In the conquered country was found a mass of legal speculation which could not fail to arouse thought. Here, as everywhere, were found local laws, customs, and practices which compelled the conquerors to reflect upon their own system. In short, every aid in the field of jurisprudence which was to be gained from other nations was received by the Romans, and by them turned to account.

## SECTION II. — DOMESTIC RELATIONS

The fundamental institution of Roman life, that institution which was most influential in moulding the law, was the Aryan family or household. It may be called by this title, because the Aryan races, more completely than any others, developed the idea. The conception was founded upon an essentially religious basis. "The theory upon which it rested was the paramount and continuous obligation of ancestral worship." The practical object at which it aimed was the regular and proper performance of the *sacra* — that is, of the worship peculiar to the household. The machinery by which the *sacra* were maintained was the corporate character of the household, and the perpetual succession of the house-father."<sup>1</sup>

The conception of the household and the position of the *pater familias* was developed in the religious direction in the Hindu law. In Greece, its development was cut short by the Solonian reforms. In Rome, it was carried out to the utmost in the legal direction. The father became

<sup>1</sup> Hearn, *The Aryan Household*, p. 63.

the irresponsible ruler of his household. He had the right to punish for any offence every member thereof; it is true that he must call a council of the chief kinsmen before inflicting punishment, but he was not obliged to abide by the decision of that council. He might sell his children into slavery; he might even put them to death. He was not merely the administrator of the family property; the whole family belonged to him. The legal ideas which later obtained in the case of property were applied in the earlier law to the relation in which wife, children, slaves, lands, and chattels stood to the father of the family. As long as a son remained *in potestate*—that is, subject to the parental authority of his father—he could hold no property. If by a juridical act the son was freed from that *potestas*, he ceased to be a member of the family, and could neither take part in the household rites nor inherit any portion of the family property. He stood in the same position as did an emancipated son in Babylonia. The same was true of the daughter when she married. She passed into the family of another than her father. She came under the authority of another *pater familias*. She was either *in manu* in respect to her husband, if he were himself a *pater familias*, or *in potestate*, if he were a son *in potestate*. Her children were not members of her father's family, but belonged exclusively to that of her husband, because they shared in the household rites of his family. But the Roman had obtained so fixed and precise a conception of the family as subject to the *pater familias* that the actual physical relationship counted for very little. The wife was not freed by the death of her husband. Together with all the property, she passed to the heir, and came under his authority as *pater familias*, though he were her own son. The child acquired by adoption stood in exactly the same relation to the family as did the son born in it. Descent was reckoned, not merely by blood, but by blood in the male line exclusively. Such relations

were known as *agnati*. This system of descent was common to nearly all Aryan law.

The family which has been described was the early patrician family. The plebeians were at first incapable of contracting lawful marriages. Even after the Servian reforms, the plebeian could not contract marriage according to the religious rites of *confarreatio*. The children of plebeian marriages were regarded by the law as not *in potestate*, because not born in lawful wedlock, or *justæ nuptiæ*. The wife did not pass under the *manus* of her husband, and the children were regarded as hers rather than her husband's. The result of all this was a less exclusive regard paid to the *agnati*. The plebeian family included the *cognati*, or relations on the side of the mother. The result of this difference in the family came later into prominence in the *jus gentium*.

The death of the *pater familias* left each son in the position of *pater familias* in his own household. The grandchildren of the deceased passed from the *potestas* of their grandfather to that of their own father. The family estate was divided, and the household was replaced by as many households as there were sons. But the family's sacred rites were retained. By this process of division there would be brought into existence a number of families having certain sacred rites in common; these would be evidence of common descent, although the families might be widely separated. The households participating in the same rites formed the *gens*. The form of the household was retained. The *sacra gentilitia* were preserved. A common name was borne by all, and the theory of common descent was held by all. A certain civil organization was maintained by the celebration of the sacred rites of the *gens*; by the chief who represented the *gens* in affairs affecting the whole body; by the existence of a council who assisted the chief; and by property held in common. The theory of descent was kept clearly before the minds of



men by the rule that the estate of a man who died without heirs went to his *gens*. The gentile organization, however, did not apply to the plebeians.

The union of *gentes* made up the *curiæ*, or the three tribes of the *populus Romanus*. Here again, the family organization was continued. The king stood to the people in much the same relation as the *pater familias* to his family. He was at once priest and judge. He promulgated laws. His council, which was supposed to represent the *gentes*, merely advised him, as the family council merely advised the *pater familias*.

### SECTION III. — SERVIAN REFORMS

The Servian reforms were most important, as they were associated with the great principle of mancipation, or the solemn act whereby ownership was transferred. It is said that the occasion of this law was a census, or registration, of all the citizens, with their property. The register was to be revised from time to time. In order to promote the accuracy of periodical revision, it was ordained that no transfer should be regarded as valid if it did not conform to a prescribed ceremony. The sale must take place in the presence of five witnesses, who must be Roman citizens. The amount paid was weighed out by an official weigher (*libripens*). The purchaser then took possession of the property. This procedure soon degenerated into a mere ceremonial, but all the essential features were retained. The witnesses, the *libripens*, the money represented by a bit of copper (*raudusculum*), and the ceremony of taking possession, all remained for centuries as part of the procedure of sale.

The first result of definitely fixing a method whereby rights might be transferred was to effect a reform in the status of the plebeian marriage. The wife became a *mater familias* by *coemptio*. The ceremony of sale was performed in all its detail, and the wife passed under the

*manus* of the husband. Another result of the law of man-cipation was the ability to dispose of an estate after death. A will was as yet unthought of; but the whole estate might be disposed of, for the benefit of an heir, to a third party, and the real owner would continue to enjoy it during his lifetime. At his death, the trustee would transfer the estate, by appropriate forms, to the heir. There was, however, no means of compelling the trustee to execute the trust.

The other great principle associated with Servius Tullius was the *nexum*, or loan, contracted with the same formalities as the *mancipatio*. The copper money was weighed out by the *libripens*, and the lender declared that such was the amount for which the borrower was in his debt. The borrower bound himself as personally responsible for the amount, and in case of failure to pay, execution might be levied upon his person. This was the primitive Roman contract.

At about the same time as the establishment of a legal method by which rights could be transferred and obligations incurred, there was a reform, closely connected with the private law, made in the constitution of the State. The plebeians were admitted to participation in the operation of the law. They were brought together into *gentes*. No new tribes were created, but the plebeian *gentes*, under the name of *gentes minores*, were made members of the patrician tribes. The plebeian thus acquired civil rights. He could buy and sell according to the legal method. Still more radical was the change which was effected in the military organization by which the rights of the plebeians were maintained. The whole body of citizens was divided into five classes, according to the ability of each citizen to provide himself with arms — or, what amounted to the same thing, according to his property. This reform should be compared with that of Solon at Athens, occurring at nearly the same date, and with much the same effect.

The typical procedure of the early law was an elaborate mock combat for the possession of the article in dispute, and was accompanied by a number of ritual observances, which were executed with great exactness. The article in dispute was brought before the magistrate. If the article was immovable, the parties repaired with the magistrate to the location of the field or other immovable object, and there carried out the *manuum consertio*, or hand-grapple, as the opening portion of the case was called.<sup>1</sup> The contestants were provided with rods, which, as Gaius points out,<sup>2</sup> represented the spear of the original actual physical contest. The plaintiff first laid his hand on the object in dispute, claiming it as his own in a precise form of words: "I say that this thing [or, in case of a slave, this man] is mine according to the law of the Quirites, for the reason I have stated." He then touched the object with his rod, adding: "Behold, I have laid my rod upon it." The defendant went through exactly the same form. The magistrate then interposed, saying: "Both let go of it." The plaintiff thereupon demanded the reason of this interference, and the defendant repeated his claim. Thereupon the plaintiff offered to stake a sum of money on the merits of the question, and the offer was accepted by the defendant. This sum of money was known as the *sacramentum*; hence the name *legis actio per sacramentum* for this form of procedure. Thus far all was merely preliminary to an examination of the merits of the case; but if at any time during these proceedings the defendant failed to make the counter-assertion, the article in dispute was at once awarded to the plaintiff. In this custom lay the origin of a mode of conveyance, known as *in jure cessio*, or title through judgment by default, which became prominent during the

<sup>1</sup> In later times, the article in dispute, if immovable, was represented by a fragment; a clod stood for the field, a brick for the house.

<sup>2</sup> Gaius, *Institutes*, IV, 13-17.



early Republic, but whose beginning belonged to the earliest period.

The second part of the trial consisted of an examination of the whole case by a non-official called the *judex*, who was appointed by the magistrate. The article in dispute remained in the custody of the party in possession, who gave security to the other party for proper delivery if the award should call for this. The *judex* who was appointed to hear the case examined the proofs brought forward by both sides, and accordingly made the award. The form of the award was a decision as to the *sacramentum*. He who won the case received back his wager; the *sacramentum* of the defeated party went to the State.

#### SECTION IV. — THE TWELVE TABLES

The most important event in the history of early Roman law was the enactment of the Twelve Tables. These ancient laws are not of importance merely as giving evidence of the state of the law of Rome in the middle of the fifth century before Christ, as well as in previous times; they furnish the text and groundwork upon which was based all subsequent Roman jurisprudence. They were regarded as fixed and inviolable. When the changed conditions of the times rendered their provisions inadequate, the ingenuity of the lawyers was directed to deducing from them such principles as would apply to novel cases. This was one of the triumphs of Roman jurisprudence. It was not because of poverty of invention that the old forms were for centuries retained and applied to a large number of widely differing questions. It was rather an evidence of a highly abstract and scientific mode of treatment, which enabled new forms of cases to be settled without additional legislation. For this reason, the appearance of the Twelve Tables marks the beginning of a scientific jurisprudence.

The immediate cause of this early codification of the law was similar to that which at Athens brought about the Draconian and Solonian codes. The kings, especially Servius Tullius, had treated the plebeians with great consideration, regarding them as royal clients. It is probable that the laws attributed to Servius, of which only a few fragments have been preserved, were merely directions given by the king to those whom he appointed to act as judges. The expulsion of the kings in 509 B.C. was followed by a prolonged contest between the patricians and the plebeians. One great grievance was the uncertainty of the law. The patricians claimed as their prerogative the knowledge and the administration of the law. The magistrates were changed every year. There was not the restraining influence of a king who might interpose. The prejudices of caste, which in Rome were hardly less than in India, found expression in many ways. When matters at last became intolerable, the patricians consented to reduce the laws to writing. It has been asserted that before this task was undertaken, investigations were made into the laws of Greece, and notably those of Athens and Sparta. It may be that some few enactments of Solon or other lawgivers were incorporated. The main body of the law, however, was of Roman derivation. It probably contained few novel provisions, and it may be said not to belong so much to the year of its compilation, 451 B.C., as to the whole of the prior period.

The following is a translation of the fragments of this code, as preserved by Cicero, Festus, Ulpian, Paul, and other lawyers and writers of antiquity, as well as by Justinian in his Digest:—

## THE TWELVE TABLES

## TABLE I

## THE SUMMONS BEFORE THE MAGISTRATE

1. If the plaintiff summon a man to appear before the magistrate and he refuse to go, the plaintiff shall first call witnesses and arrest him.

2. If the defendant attempt evasion or flight, the plaintiff shall take him by force.

3. If the defendant be prevented by illness or old age, let him who summons him before the magistrate furnish a beast of burden, but he need not send a covered carriage for him unless he choose.

4. For a wealthy defendant only a wealthy man may go bail; any one who chooses may go bail for a poor citizen of the lowest class.

5. In case the contestants come to an agreement, the magistrate shall announce the fact.

6. In case they come to no agreement, they shall before noon enter the case in the comitium or forum.

8. To the party present in the afternoon the magistrate shall award the suit.

9. Sunset shall terminate the proceedings.

10. . . . sureties and sub-sureties . . .

## TABLE II

## JUDICIAL PROCEDURE

2. A serious illness or a legal appointment with an alien . . . should one of these occur to the judge, arbiter, or either party to the suit, the appointed trial must be postponed.

3. If the witnesses of either party fail to appear, that party shall go and serve a verbal notice at his door on three days.



## TABLE III

## EXECUTION FOLLOWING CONFESSION OR JUDGMENT

1. A debtor, either by confession or judgment, shall have thirty days grace.
2. At the expiration of this period the plaintiff shall serve a formal summons upon the defendant, and bring him before the magistrate.
3. If the debt be not paid or if no one become surety, the plaintiff shall lead him away, and bind him with shackles and fetters of not less than fifteen pounds weight, and heavier at his discretion.
4. If the debtor wish, he may live at his own expense ; if not, he in whose custody he may be shall furnish him a pound of meal a day, more at his discretion.
6. On the third market day the creditors, if there are several, shall divide the property. If one take more or less, no guilt shall attach to him.

## TABLE IV

## PATERNAL RIGHTS

3. If a father shall thrice sell his son, the son shall be free from the paternal authority.

## TABLE V

## INHERITANCE AND TUTELAGE

3. What has been appointed in regard to the property or tutelage shall be binding in law.
4. If a man die intestate, having no natural heirs, his property shall pass to the nearest agnate.
5. If there be no agnate, the gentiles shall succeed.
7. . . . If one be hopelessly insane, his agnates and gentiles shall have authority over him and his property . . . in case there be none to take charge, . . .
8. . . . from that estate . . . into that estate.

## TABLE VI

## OWNERSHIP AND POSSESSION

1. Whenever a party shall negotiate a *nexum* or transfer by *mancipatio*, according to the formal statement so let the law be.

5. Whoever in presence of the magistrates shall join issue by *manuum consertio* . . .

7. A beam built into a house or vine-trellis shall not be removed.

9. When the vines have been pruned, until the grapes are removed . . .

## TABLE VII

## LAW CONCERNING REAL PROPERTY

5. If parties get into dispute about boundaries . . .

7. They shall pave the way. If they do not pave the way with stones a man may drive where he pleases.

8. If water from rain gutters cause damage . . .

## TABLE VIII

## ON TORTS

1. Whoever shall chant a magic spell . . .

2. If a man maim another, and does not compromise with him, there shall be retaliation in kind.

3. If with the fist or club a man break a bone of a freeman, the penalty shall be three hundred asses ; if of a slave, one hundred and fifty asses.

4. If he does any injury to another, twenty-five asses ; if he sing a satirical song let him be beaten.

5. . . . if he shall have inflicted a loss . . . he shall make it good.

8. Whoever shall blight the crops of another by incantation . . . nor shalt thou win over to thyself another's grain. . . .

12. If a thief be caught stealing by night and he be slain, the homicide shall be lawful.

13. If in the daytime the thief defend himself with a weapon, one may kill him.

15. . . . with a leather girdle about his naked body, and a platter in his hand . . .

16. If a man contend at law about a theft not detected in the act . . .

21. If a patron cheat his client, he shall become infamous.

22. He who has been summoned as a witness or acts as *libripens*, and shall refuse to give his testimony, shall be accounted infamous, and shall be incapable of acting subsequently as witness.

24. If a weapon slip from a man's hand without his intention of hurling it . . .

#### TABLE IX

(No fragments of this table are extant.)

#### TABLE X

##### SACRED LAW

1. They shall not inter or burn a dead man within the city.

2. . . . more than this a man shall not do . . . ; a man shall not smooth the wood for the funeral pyre with an axe.

4. Women shall not lacerate their faces, nor indulge in immoderate wailing for the dead.

5. They shall not collect the bones of a dead man for a second interment.

7. Whoever wins a crown, either in person or by his slaves or animals, or has received it for valor . . .

8. . . . he shall not add gold . . . ; but gold used in joining the teeth . . . This may be burned or buried with the dead without incurring any penalty.



## TABLE XI

(No fragments of this table are extant.)

## TABLE XII

## SUPPLEMENTARY LAWS

2. If a slave has committed theft, or has done damage . . .

3. If either party shall have won a suit concerning property by foul means, at the discretion of the opponent . . . the magistrate shall fix the damage at twice the profits arising from the interim possession.<sup>1</sup>

The first great result of the enactment of the Twelve Tables was the establishment of a law defined by statute, instead of mere custom. The magistrates had not hitherto been bound by the details of custom, but could alter these at their will. But a law could not be altered by the magistrate. It was a principle "laid down" or "settled." It bound both the magistrate and the people. Hardships might arise under it; but they were hardships which might be anticipated. The value of a definite law, a *lex publica*, was inestimable.

The second great result of the enactment of the Twelve Tables was the clearer conception of *jus* as distinguished from *fas* or *boni mores*. *Nefas* was an offence against the gods. It was what might be called a sin. The guilty person might be punished by the confiscation of his goods, by banishment, or by capital punishment. By this act he had made himself hateful to the gods, and he must be removed or punished. By this theory a great number of matters were brought under control. In domestic rela-

<sup>1</sup> For a careful study of the legal system based upon the Twelve Tables, and an elaborate discussion of the fragments and references to these tables, and the filling of *lacunæ*, see: M. Voigt, *Die XII Tafeln: Geschichte und System des Civil- und Criminal-rechtes, wie -processes der XII Tafeln nebst deren Fragmenten*. Leipzig, 1883.

tions, the father was restrained by this idea of *fas* from the full exercise of his authority. He might not sell his wife. He might not punish a member of his household without first calling a family council. The stranger received protection, because a wrong done to him was an offence against the gods, *nefas*. But *jus* signified a right which could be enforced by process of law. It did not belong to every one; it was restricted to a limited number, to citizens. It could be acquired or lost. It was secular in its nature, and was enforced by sanctions which were purely secular. It might either be customary law, as was the case before the appearance of the Twelve Tables, or statute law, as after that period. In either case, it differed from *boni mores*, inasmuch as offences against the latter were not actionable, though possibly punishable. The rules of *boni mores* were not binding, as were the customs comprised under *jus*. For example, a contract was not capable of enforcement by legal process unless it were concluded *per æs et libram*; that is, with the ceremony of mancipation, or by a *sponsio*. In either case a *jus* was created, arising from a *nexum*; and for breach of such a contract damages might be awarded. But by *boni mores* the Roman was held to the performance of the contract, even if this had not been concluded with the prescribed formalities. It was the function of legislation, such as that of the Twelve Tables, to precisely define what was *jus* and what was merely *boni mores*, and above all to include under *jus* much that had hitherto been merely a matter of *boni mores*, or non-enforceable custom.

Several important sections of the Roman law can be traced to the Twelve Tables, and, indeed, seem to have first become law by the enactment of this code. The labors of the Pontifical College brought out the principles of the code by a method of scientific investigation. But in germ the principles were already present. The family, for instance, was affected in several ways, of which two

were the most prominent: new forms of marriage and mancipation. Since property right was acquired by *usus* for one year, the same results as those which followed a marriage by coemption could in a simple manner be obtained. Mere cohabitation for one year constituted a lawful marriage. She who was before merely *uxor* became *mater familias*. This had been the custom before the date of the Tables; but these regulated the custom and gave it binding force. It is said by Cicero that the Tables provided for divorce by the simple process of telling the woman to take what belonged to her and begone.<sup>1</sup> This probably applied only to the more or less irregular unions in which valid marriage had not been completed by *usus*. For possession by *usus* could be, and often was, prevented by the woman's absence for three consecutive nights within the year. The Tables provided that if a father sold his son three times, the latter might be free.<sup>2</sup> This rule was probably due to the custom of conveying a son as security for debt. Such an act was an offence against *boni mores*. The third repetition made the son free of the *potestas* of the father. This provision became a means of emancipating the son, and was at last reduced to a mere formality.

Closely connected with the law of the family was the law of inheritance. Even before the appearance of the Tables, the *pater familias*, by mancipation, could dispose of his property to the heir or another, with instructions to administer it in a prescribed manner. But there was no law compelling the *familiae emptor*, or person receiving the estate, to abide by the conditions of the sale. Everything was left to his good faith. The Tables changed this by

<sup>1</sup> Cicero, *Phil.*, II, 28. Cf. *De Orat.*, I, 40.

<sup>2</sup> So enduring was the power of the *pater familias*, that though he had sold his son, that son, if freed by the person who had bought him, was not free as to the *patria potestas*, to which he stood in the same relation as before the sale.



making binding any conditions made at the time of sale. This was the origin of the modern will. The conditions of the sale were reduced to writing. At a much later period, the formal transfer of the property was omitted; the mere recorded intention or desire was sufficient. In all this there was a wide divergence from the primitive conception of the relation of the *pater familias* to the *patrimonium*, or family property, whereby, as the oldest member of the family, the head of a corporation to administer the property, he became the owner of the family, able to do with it as he pleased. In early Aryan law, disposal of property after death was an unheard-of proceeding, because there was no absolute ownership. This phase of law was thoroughly worked out in India, where the law placed restrictions upon the *pater familias*. Roman law increased his power, making him owner rather than administrator.

The Tables also regulated the customary form of inheritance, or intestate succession. Those who were *in potestate*, or *sui heredes*, succeeded to the estate; not as a community, however, but as individuals sharing alike. On the death of the *pater familias*, they became *sui juris*. In default of *heredes*, the *agnati*—that is, those who would, if the male ancestor had been living, have been under the same *potestas*—succeeded. Brothers, brothers' sons, paternal uncles and nephews—in all cases by male descent—were *agnati*. Sons of the same mother by different husbands, and all relations on the mother's side, were not *agnati*. In the default of *agnati*, the *gens* succeeded.

There were other important legal points, such as the law of guardianship. The nearest agnate was the guardian,<sup>1</sup> if none had been appointed by the deceased. The law of adoption was also improved.

The law of property was modified—or rather a custom

<sup>1</sup> Gaius, *Institutes*, I, 155.

necessarily existing was legalized — by the recognition of a distinction between property which could be transferred only by the formal ceremony of mancipation — *res Mancipi* — and that which could be transferred by simple *traditio*. In theory the former class originally included all varieties of property, but in fact it soon became limited to those things which constituted a farmer's stock in trade, such as his land, slaves, and beasts of burden. But the simple formless mode of sale must have been employed by the plebeians before the promulgation of the Tables, since this class was debarred from using the Quiritarian forms of mancipation. The rapid exchange of commodities such as food, clothing, and simple chattels, would have been impossible without the existence of some simpler form than that of mancipation. The general rule as defined by the Tables was that no title passed to the purchaser until the price was paid or security given. This applied to the *traditio* as well as to the *mancipatio*.

Closely connected with the law of mancipation was that by which the vendor was compelled to guarantee the title of the vendee. This warranty continued for two years in the case of immovables, one year for all else. The termination of these respective periods remedied any defect of title. This *usus* ultimately became a very important element of the law. The warranty did not apply to the sale termed *in jure cessio*, as that form of transfer was merely an acknowledgment by the vendor that he had no right to that which was transferred.

Even more important, as opening up an entirely new field of jurisprudence, was the law as to *verba nuncupata* uttered in connection with a mancipation. Almost any condition could be attached to a sale *per æs et libram*. As noted above, this was the basis of the Roman will; but the *leges Mancipii*, as the condition was called, would naturally be applied to many other relations of a fiduciary nature. Trusteeship was thereby created. But the per-

son who by mancipation had given the property in trust could resume it in a simpler manner than by another mancipation. It was only necessary for him to continue in possession for one year, as in the case of movables. This custom was termed *usu receptio*. It is a question whether *res nec Mancipi* could be conveyed *per æs et libram*. If they could not thus be conveyed, then they could not be included in the class of objects capable of being mancipated with conditions annexed. It seems probable, however, that the law for the conveyance of *res nec Mancipi* was merely permissive. Some things might be conveyed in that manner, though with an inferior title; but mancipation remained the normal mode of transfer, although an ever increasing number of exceptions were constantly being made.

#### SECTION V. — JUDICIAL PROCEDURE

The judicial procedure which had formed the most notable part of the Athenian law found a counterpart in the early Roman procedure, as contained in the Twelve Tables. The Tables do not lay down the mode of procedure of the different actions of the law, *legis actiones*; these were probably earlier than the Tables themselves, but the development and finer elaboration belong to the period following the decemviral legislation. The early procedure comprised four actions, namely: the *legis actio per sacramentum*; that *per iudicis postulationem*; that *per manus interjectionem*; and that *per pignoris capionem*. A fifth action was that *per condictionem*, introduced by the Silian and Calpurnian laws, and belonging to the earlier period of the Republic.

The *legis actio per sacramentum* has already been described as the general method of procedure during the royal period of Roman history, but it was not the only method in use, nor was it positively that of earliest origin. A slight examination of this action at once reveals the



presence of several entirely distinct ideas, belonging to different periods of legal history and appearing somewhat in historical order of precedence. Thus, there is the simple physical contest for the article in dispute, the interference of the magistrate, the appeal to some religious tribunal or an oath by the gods, and some assertion of the right in connection therewith, — for the *sacramentum* must originally have been more than a mere wager, — and finally the arbitration. This ritual is a clear proof of an earlier form, or forms, from which the action must have arisen. The *legis actio per sacramentum* was the characteristic method of procedure throughout the earlier periods of Roman history. Other actions probably existed with it, and in the action *per manus interjectionem* the fundamental conception is quite as primitive, and certainly less complicated. But all the forms of action underwent such modifications, or were so regulated by the legislation of the decemvirs, that they may be best considered in connection with the Twelve Tables.

Among the provisions of the Tables concerning the first form of action, the *sacramentum*, is one respecting the interim possession of the property in dispute. This appears to have been new, and a relief to some injustice or hardship occasioned by the earlier law. The new provision gave to the interim possessor, if the decision went against him, the right to have arbitrators appointed, who should assess the value of the article to be recovered and the amount of loss occasioned by its non-restitution. The damages for non-restitution were fixed at double the value of the object and the fruits. This gave much needed relief in cases where restitution had become impossible.

The first form of action was applicable to every case in which ownership was involved, that is to say, *manus* in the original and unrestricted meaning. It therefore extended to all domestic relations, including slavery. Thus, he who

was falsely alleged to be a slave might recover his freedom by such an action, brought by a third party (*adsertor libertatis*). In this case, the Tables declared that the person in question was to enjoy his freedom while the case was pending, and the *sacramentum* was fixed at fifty asses. This provision is significant in its evidence of the early beginning of that process of extension by which the law, without losing its primitive form, became sufficiently elastic to cover a multitude of differing cases.

The second method of procedure was the *actio per iudicis postulationem*. Little is known of this form of action. It was distinguished from that *per sacramentum* chiefly in two respects: there was no wager, and the amount to be recovered was not necessarily a definite sum. In the first action, it was requisite that the sum should be stated, or that the subject of dispute should be a specific object. The plaintiff must make good his claim to the last penny. Furthermore, the *sacramentum* could not be less than a fixed amount — fifty asses — and when the amount to be recovered was smaller than this, that action did not lie. In case of a bodily injury, the amount of damages could not be definitely fixed, and the *lex talionis*, by which such an injury was repaid in kind upon the person of the wrongdoer, was inadequate as a satisfaction to the injured party. This necessitated a civil form of procedure in such cases, and led to the establishment of the form mentioned. There is, however, no reference to this process in any extant fragment of the Tables, and the cases in which it was employed can only be conjectured. The proceedings began with a formal statement of the wrong done, and the magistrate was requested to appoint arbitrators who might assess damages. This duty very naturally included inquiry into the truth of the charges, upon whose substantiation, to the very letter, depended the success of the suit.

The third action, that *per manus injectionem*, was origi-

nally a species of execution, especially applicable to the satisfaction of a nexal obligation, or a debt solemnly contracted *per æs et libram*. It was, however, extended to a number of cases of judgment debts, namely, the award of arbitrators, as in the *legis actio per judicis postulationem*; the judgment of a magistrate in those cases afterward known as *in jure cessio*, or when the defendant acknowledged the justice of the plaintiff's claim while the case was still *in jure*—that is, before the magistrate—and when no further proceedings were had; and also the judgment of the *judex*, or judge, to whom the case was submitted by the magistrate. Its primitive form was extremely harsh, and gave rise to many abuses which caused no little disturbance in the city. Subsequent legislation greatly modified it, rendering it less severe.

✓ In principle, this action was an execution upon the person of the debtor, and is therein distinguished from the fourth form of action, or the *pignoris capio*, which was an execution upon the goods of the debtor. In the former, thirty days were allowed, by way of grace, after the maturity of the nexal debt, or the judgment in the case of a judgment debt. At the expiration of that period, if no security was given, the creditor might arrest the debtor and bring him before a magistrate. For this act the creditor required no warrant or other authorization. He merely stated the cause of the arrest and the amount due. So far there was only the extra-judicial *manus injectio*, and this should be distinguished from what followed, or the judicial *manus injectio*. This consisted in a ceremony in the presence of the magistrate, in which the creditor solemnly laid his hands upon the person of the debtor. The nexal debtor was given opportunity to prove, by not less than five witnesses, that the *nexum* had been paid; or he might then and there pay it. If he took neither course, the ceremony of *manus injectio* followed, and the creditor put into force his right, involved in the idea of the *nexum*,



to detain the debtor. In the case of a judgment debtor,<sup>1</sup> the creditor had no right, apart from the authorization of the magistrate (*addictio*), to incarcerate or otherwise hold the person of the debtor. This right must be acquired, and was given provisionally, unless the debt was immediately paid or a new suit instituted by the intervention of a *vindex*. It is probable that in the earlier law the *addictio* was not necessary, because the *manus injectio* rendered it impossible for the debtor to make any defence. He was by this act reduced to a servile condition. Thus he could defend himself only through a third party, the *vindex*, at first probably a friend, afterward an attorney. The *vindex* interposed, claiming that the suit on which judgment had been rendered was unjust, and he demanded a new hearing. The debtor was thereby released from the attachment of the creditor, and could not a second time be attached for the same debt; but the *vindex* became liable for the debt in double the amount claimed. The suit arising from this interference was tried in the ordinary manner. The magistrate appointed a *judex*, who heard the case. "It is in this sense that *manus injectio* begets an *actio*, viz. the *legis actio per manus injectionem*. Judicial *manus injectio* (i.e. the act of execution) implies a right to have any issue that may arise in the event of the claim being contested, tried by a *judicium*." <sup>2</sup>

In case the debt was not paid and there was no intervention of a *vindex*, the debtor was incarcerated for sixty days in the domestic prison of the creditor. During the last thirty days of this period, he was produced by the creditor for three successive market-days in the *comitium*,

<sup>1</sup> Unfortunately the description of this action as given by Gaius, *Institutes*, IV, 21, in accordance with his custom, refers only to one case, that of a judgment debtor.

<sup>2</sup> R. Sohm, *The Institutes of Roman Law*, Oxford, 1892, p. 158. This result of the *manus injectio*, whereby an action at law grew out of it, or was begotten by it, was first clearly and effectively shown by Ihering, *Geist des Römischen Rechts*, I, p. 152 ff.

in order that some one of his friends might ransom him. Should no one do this, the magistrate, at the expiration of the period of incarceration, issued an *addictio*, permanently awarding him to the creditor, whose slave he became.

Our knowledge as to the next step in the action is very incomplete. According to Gellius,<sup>1</sup> a debtor "*capite pœnas dabat*," by which it has been generally understood that the debtor was put to death, and further, according to the wording of the law, "*Tertiis nundinis partis secanto. Si plus minusve recuerunt ne fraude esto.*" The customary interpretation is that of Gellius, who gives the law. It is that the body was cut into pieces by the creditors, if there were more than one, and divided among them.<sup>2</sup> It should be noted that no such division of the body is known to have taken place. Both Quintilian<sup>3</sup> and Tertullian<sup>4</sup> in speaking of this action, acknowledge that no *sectio corporis* had been known to have occurred. In any case, however, the fate of the debtor was hard, whether he was liable to be dismembered and divided among his creditors, or to be sold as a slave, and the proceeds divided among those whom he owed.

Subsequent legislation modified the hardships of the debtor. He could preserve his personal freedom by surrender of his property to his creditors, provided that the property was sufficient to pay his debts. He could not be reduced to servitude, except by judgment of a court. The summary proceedings upon a *nexum* were thus done away with, and the debtor freed from his heavy obligations. The creditor could no longer incarcerate him, scourge him, or put him into heavy fetters and foot-blocks, unless the debt arose from the commission of crime. He

<sup>1</sup> Gellius, *Noctes Atticæ*, XX, 1, §§ 41-51.

<sup>2</sup> For a brief discussion of this point, with a number of references, see Muirhead, *Historical Introduction to the Private Law of Rome*, 1886, pp. 202-211.

<sup>3</sup> *De Institutione Oratoria*, 6, 84.

<sup>4</sup> *Apologeticus adversus Gentes*, c. 4.

must be employed in some way which should be a source of profit, so that he might in time work off the debt, and eventually be discharged. The effect of the *nexum* was so far modified by the *Lex Pœtillia Papiria* (326 B.C.), that the borrower did not assign himself *per æs et libram* to the creditor. The *manus injectio* was by this legislation limited to judgment debts. But incarceration as a form of execution was not abolished even by Justinian, although other forms were provided which practically took its place.

The fourth form of action was that *per pignoris capionem*. It resembled the *manus injectio*, inasmuch as it began with an act for satisfying a debt which was akin to "distress" in English law. It was allowable in only a few cases. It was applied by custom to certain military debts. A soldier might seize as a pledge for pay due him any article belonging to his paymaster. A cavalry soldier could do the same if money for his war-horse or for provender were owed to him. By a law of the Tables, this action applied in the case of certain debts connected with sacrifices. Thus, it might be employed against one who had purchased a sacrificial victim and had not paid for it, or against one who had not paid the hire of a beast of burden, let in order that the money received might be spent for a sacrifice. The action could also be used against delinquent taxpayers.

Gaius<sup>1</sup> says of this action: "In all cases the taking of the pledge was accompanied by the use of a set form of words, for which reason the majority of the jurists concluded that this also was a *legis actio*. Other jurists, however, were not of that opinion, first, because the *pignoris capio* was transacted out of court and most commonly in the absence of the adversary, whereas the other *legis actiones* must be executed before the prætor and in the presence of the adversary; and, lastly, because the pledge

<sup>1</sup> *Institutes*, IV, 29.



might be seized even on a *dies nefastus*, that is to say, at a time when proceedings in court were unlawful." It is, however, very probable that the person whose property was seized had the right of protesting against the distraint, and that his protest was made before a magistrate. This would lead to a decision by a *judex*, to whom the case would be referred, and it would thus be entirely similar to the other actions.<sup>1</sup>

<sup>1</sup> Cf. Ihering, *op. cit.*, I, p. 159 ff. ; also Gaius, *Institutes*, IV, 32.

## CHAPTER VIII

### PERIOD OF THE REPUBLIC

#### SECTION I.—THE STIPULATIO

THE period following that of the Twelve Tables was in many respects the most important in the history of Roman law. It was the period when the great foreign conquests of Rome were made, and that in which the Empire was built up and during which the causes of that Empire's future decay began to take form. The momentous changes in the private life of the Romans, occasioned by the rapid and enormous increase of territory and by intimate contact with the many and varied subject nations, were reflected in the law by which the older forms of commercial activity were adapted to the new demands of commerce. The political questions which arose upon the consolidation of so many distinct peoples within the Roman system were answered by such changes in the judicial constitution of the Republic as to introduce little less than a revolution. But it was a revolution so slow in its course and for a time so beneficial in its effects as to meet the legitimate demands of even the most conservative.

The most important development of the law during the period of the Republic was effected by the activity of the prætor. Important modifications of the law were introduced by the prætors, and the law itself was adapted to the ever increasing demands of commercial life. These adaptations were carried yet further, and were applied to the laws of succession. By the same officials, new forms of acquiring property were devised and new forms of ten-

ure established. The ancient Roman form of contract, the *nexum*, was replaced by a form which admitted the greatest variety of employment. And with the development of the law of contract arose all those conditions of validity which are connected with that law, and which have remained as the common property of subsequent legal systems.

Although the greatest changes in the law of Rome were made during the period of the Republic, yet these, with few exceptions, were not brought about by direct legislation, or even recognized by enactment of the *Comitia*. The most important, and perhaps earliest, of these exceptions was the *stipulatio*. This may be defined as a contract made by a formal question and answer, imposing duties on the promisor, and capable of being enforced by process of law. It differed from the earlier obligations in being so enforceable, and therefore stood upon the same footing as the *nexum*. But it differed from that earlier form of contract in that it was unilateral; that is, it did not impose duties upon the person to whom promise was made. No consideration, therefore, was necessary, and to sustain an action on a stipulation there was no need to prove a consideration. Reciprocal obligations were therefore possible only by two independent stipulations, in which the promisor in one became the promisee in the other.

Like the *nexum*, the validity of the *stipulatio* was dependent upon the exact form in which the obligation was assumed; and like the earlier forms of *mancipatio* and *nexum*, its employment was confined to Roman citizens. The language employed was strictly formal. The question asked was: *Spondesne mihi dare?* to which the promisor responded, *Spondeo*. *Spondesne* and *spondeo* were essential to the validity of the contract; all equivalent expressions were of later origin, and were introduced by the prætors in connection with intercourse with non-



Romans. As Gaius says: "The obligation created by the words, *Dare spondes? Spondeo*, is peculiar to Roman citizens. The others — *Promittisne? Promitto; Fidejubesne? Fidejubeo*, etc.—belong to the *jus gentium*, and therefore hold good between all men, whether Roman citizens or aliens. And even though expressed in Greek, they hold good between Roman citizens if only they understand Greek; and conversely, though uttered in Latin, they hold good between aliens if only they understand Latin. But the former is so peculiar to Roman citizens that it cannot properly even be translated into Greek, although it is said to be fashioned after a Greek phrase."<sup>1</sup> It was also necessary that the *stipulatio* should be made by the spoken word. This condition was retained even to the last, and appears in the Digest.<sup>2</sup> But a written record would, as a matter of precaution, soon follow the general employment of the *stipulatio* in business. It would have the advantage over the oral stipulation in that it would prove the presence of both parties at the place of making the contract, and it would also establish the facts as to the form in which the promise had been made. It was absolutely necessary to prove these points in order to enforce a contract, and in course of time the written record was taken as *prima facie* evidence that the *stipulatio* had been made. It was so viewed by the great juriconsults of the early Empire, and the practical transformation of the oral promise into the written and signed contract was effected by the Justinian legislation. "All such writings as bear on their face that the parties were present, are in any case to be believed, unless the party that employs such audacious allegations<sup>3</sup> can show by the most unquestionable proofs, either in writing or by competent witnesses, that the

<sup>1</sup> Gaius, *Institutes*, III, 93.

<sup>2</sup> D., 45, 1, 1, 2.

<sup>3</sup> That is, denying that they were present when the contract was made.

whole of that day on which the document was drawn up, he or his opponent was elsewhere.”<sup>1</sup>

The origin of the *stipulatio* is uncertain. Its employment of the words, *spondeo*, *spondeo*, seems to connect it with some previous custom which had passed away and been forgotten, like many other forms and ritual acts. Three theories have been proposed: first, that these words were the verbal remnant of the *nexum*, retained after disuse of the ritual acts *per æs et libram*; second, that the form of the *stipulatio* was evolved out of the oath taken at the great altar of Hercules in the case of a covenant or an appeal to *fides*, whereby the covenant which was not actionable was placed under the protection of the gods, so that its violation involved a sin or *nefas*; third, that it was imported from Latium, which it had reached from some of the Greek settlements lying further south.<sup>2</sup>

According to Leist,<sup>3</sup> the original meaning of *σπονδή* was very closely connected with an oath invoking the divine vengeance upon the violator of the provisions so confirmed. It was first used in war, either as founding a federation of States or as instituting a peace between contestants. The *σπονδή* was a libation offered to the gods, and is mentioned as such by Homer and Herodotus, in speaking of the conclusion of treaties. From this, the *σπονδαί* came to mean contracts which were binding upon good faith, though many forms were used to render the obligations yet more solemn. The retention of the exact ancient phrase was the practice of the Greek colonists in Italy, and the Latins adopted it, applying it to any compact which was especially under the care of the gods. The date when this custom was recognized as a legal substitute for the *nexum* is uncertain; but reference to it as a practice is certainly to be found in the *Lex Aquilia* of 277 B.C.<sup>4</sup> How much

<sup>1</sup> J. Inst., III, 19, 12.

<sup>2</sup> Cf. Muirhead, *op. cit.*, p. 228 f.

<sup>3</sup> *Græco-Italische Rechtsgeschichte*, 1884, p. 460 ff.

<sup>4</sup> Cf. Gaius, *Institutes*, III, 26, 215.

earlier than this date the *stipulatio* was in use cannot be determined. Bekker<sup>1</sup> places its use earlier than the date of the Twelve Tables.

From this simple form of contract a vast number of contracts were developed by annexing various conditions, and the original form was applicable to every variety of contract; in fact, as Hunter remarks: "The stipulation was not confined to particular transactions, such as buying and selling, or hiring, or the like, but was coextensive with the subject-matter of contract. It was not so much a contract as a universal form by which any promise could be made binding in law."<sup>2</sup>

The question as to the action by which the *stipulatio* was enforced is in doubt. At the time when such contracts are certainly first known as existing, there seems to have been no form of action directly applicable. Bekker (*l. c.*) thinks that they were enforceable by the *actio per sacramentum*, but this is very doubtful. The action to which the form ultimately gave rise was the *condictio*, which was introduced by the *Lex Silia*.<sup>3</sup> According to Gaius, this action was given its name from the *condictio* (notice) which the plaintiff gave to the defendant to appear in court on the thirtieth day from date of notice, for the purpose of choosing a *judex*.<sup>4</sup> It was afterward treated less formally, for before the time of Gaius notice had ceased to be given. By the *Lex Silia*, this action applied to cases where there was a definite sum of money claimed — *pecunia certa credita*; but by the *Lex Calpurnia*, which was somewhat later than the *Lex Silia*, the same action might be employed in the case of any definite thing or quantity. The *pecunia certa credita* was very strictly

<sup>1</sup> *Actionen*, I, p. 146 f.

<sup>2</sup> *Roman Law*, London, 1885, p. 460.

<sup>3</sup> The date of this law is very uncertain. Hunter places it at 244 B.C.; Ihering, at 350–300 B.C.; Voigt, at 443–425 B.C.

<sup>4</sup> Gaius, *Institutes*, III, 4, § 18.



construed. The promisor was bound to no more than he actually promised; unless it was so stipulated in the contract, he was not liable to interest because of delay in performance. In the time of Gaius, this action was by many looked upon as superfluous. He asks: "What was the need of this action when anything that ought to be given us might be recovered by the *sacramentum* or *per judicis postulationem*?" That is a question that has been largely discussed."<sup>1</sup>

There were, however, sufficient reasons for the new action. As Poste points out, "At this period the *sacramentum* would be practically confined to real actions before the centumviral court; *condictio* would be the appropriate personal action for recovering a certain sum or thing due upon a unilateral contract . . . and *judicis postulatio* the appropriate personal action for recovering an uncertain sum due on a bilateral contract and enforcing obligations to perform (*facere*) rather than to convey."<sup>2</sup> Again, the action involved wager of money, one-third of the amount in dispute, which went to the successful party. In the *sacramentum* the wager went to the State. Finally, the *condictio* was not the immediate appeal to the magistrate, but it gave notice of a time prior to which the debt must be paid, or the law must take its course. Unfortunately we know but little of the actual course pursued in this species of action, and the introduction of the formulary system made the whole system of *legis actiones* less important as Roman law developed.

An interesting development of the *stipulatio* was the judicial stipulation. This was, however, not a contract, but a solemn engagement, such as to prevent future injury by binding the person from whom injury was feared to make good any damage which might result from his act or negligence. This was a *prætorian stipulation*, and closely

<sup>1</sup> Gaius, *Institutes*, IV, 20.

<sup>2</sup> Poste's *Elements of the Roman Law*, by Gaius, IV, §§ 18-20.

connected therewith was that of the *ædiles*, such as the following: an heir who was bound to pay a legacy at a future day was compelled to promise by stipulation that he would meet the claim when due and also to give sureties; if he could not, or would not, do this, the legatee was placed in possession.<sup>1</sup>

## SECTION II. — BEGINNINGS OF PRÆTORIAN LAW

The importance of the rise of the power of the prætor lay in the substitution of a system of <sup>fairness</sup> equity for the strict letter of the law. It was due to the prætors that the Roman Law became progressive and able to adapt itself to the changed conditions which followed the Punic wars. It was due to the prætors that there arose a really scientific jurisprudence, founded upon the eternal principles of justice, and that the barriers which withheld the advantages of the law from all but the privileged were broken down.

The prætor was originally a sort of third consul. The office was first established in 367 B.C. The title had been applied as one of honor to early consuls, and the power of the office was consular. Yet the prætor was inferior to the consuls, in that he had no military command but was only concerned with the administration of justice. In addition to his judicial functions, the authority of the prætor was twofold. He had the power of issuing an *edict* — *jus edicere* — which had much the force of a law; and he had — what was equally important — power to carry into effect any decision made by a court. It might seem from this that he was almost unrestrained in his authority; but the changes introduced by prætorian authority were actually effected very slowly.

Although the prætor brought about the greatest changes in the law, his jurisdiction was not opposed to, or apart from, that law. He was, in fact, the chief judicial officer

<sup>1</sup> D. 36, 3, 1, 2.

of the State, administering the civil law in the ordinary course of procedure. It was to him that complaints were made by the plaintiff. He granted the right to bring an action. He appointed the *judex* who should investigate the facts of the case and assess damages. It was he who gave effect to the judgment of the *judex*. His judicial authority was yet more extended. In some cases he himself assumed the office of *judex*, and tried the case without referring it. In these cases — *cognitiones extraordinariæ* — he stepped quite beyond the traditional form of suits, and after personally investigating the case he issued a decree, which by his authority he would enforce by fine or punishment.

The influence of the prætorship on the history of the Roman Law depended in part upon the interpretation which the prætor gave to the civil law as it existed. The letter of the ancient Twelve Tables was retained, but the imperfections of that system called for correction, and its crudities needed to be modified to meet the demands of a different age. This was partly done by refinements of interpretation, and partly by legal fictions. In this way principles which were practically new were introduced without contravening the old text. At the same time, a great many cases arose which were decided by the application of the underlying principle rather than the text itself.

The manner in which the prætor exercised his judicial authority, and the results of *quasi*-legislative function, may best be seen in his dealings with the *legis actiones*. Inasmuch as it was the duty of the magistrate to grant or deny an action, he had enormous power of control over the law; for rights are rights in law only so far as they can be enforced by process of law. This control of the prætor over actions was twofold. He could refuse an action, when, according to the letter of the law, one was allowable, or he could grant an action when none was provided. He



could further devise entirely new forms of action. All this was distinctly seen as the formulary system took the place of the older actions. "In *legis actio* the legislators and the litigants seem alone to occupy the scene. The prætor is only present as master of the ceremonies, and even as such can only utter sentences which the legislator has previously dictated. In the formulary system the prætor appears with much larger attributions; he seems to have stepped in front of the legislator and has taken much of the initiative from the suitors."<sup>1</sup> In the case of the newly devised forms of action, the prætor, except so far as he abstained from inserting in the formula certain phrases—such as the almost sacred term *oportere*—certainly exercised the functions of a legislator.

The formulary system grew out of the prætor's administration of the law. The defects in the older forms of actions were manifest. Especially was this the case in respect to the strictness with which the plaintiff was bound by the letter of the formula; for by the formula with which the case was handed over to the *judex* the right of action was "consumed." But these formulæ were invariable. By an extraordinary conservatism, if a man desired to sue his neighbors for damages for cutting his vines, he had to sue under the provisions of the Twelve Tables for cutting his trees, and the formula had to be worded accordingly, or action would not lie.<sup>2</sup> As Gaius says, "All these *legis actiones*, however, became by degrees odious; for by their excessive refinements the authors of our law brought the matter to such a pitch that a suit was lost for the most trifling and technical error."<sup>3</sup> The formula therefore, in its strictness, became a useless and misleading form.

Besides all this, the actions were allowable only between Romans. The alien was therefore deprived of any means of maintaining his rights. It is because of this that it

<sup>1</sup> Poste, *op. cit.*, Gaius, IV, 138-170.

<sup>2</sup> Gaius, *Institutes*, IV, 11.

<sup>3</sup> *Ibid.*, 30.

seems very probable that the merit of taking the first decisive step toward the substitution of the formulary system for the *legis actiones* belongs to the *prætor peregrinus*, who had cognizance of the affairs of aliens. But, if this were true, the *prætor urbanus* was by no means tardy in adopting the new method, as he was thereby enabled to grant actions which were entirely novel in form.

### SECTION III. — THE FORMULARY SYSTEM

The new system consisted in the employment of the written statement of the point at issue, given by the prætor to the *judex*, or the *recuperator*, as he was called in these suits, with the direction that if he found certain facts to be true he was to order the defendant to pay to the plaintiff a determined amount, or to perform a determined act. It did not leave open the question of law. That had been decided by the prætor before the case was given to the *recuperatores*. This statement as to the facts was not confined to any precise form; it was in time allowable to use any form that clearly set forth the point at issue.

The employment of the written formula as a substitute for the traditional spoken words of style was an immense forward step; although the Romans seem not to have been aware of the magnitude of the advance thus made. But although it was the only form in which the alien could maintain his right, it was a distinct encroachment upon the true Roman system. The result was a controversy between the adherents of the new prætorian system and those of the older system, which was under the patronage of the pontiffs. It was probably as a conclusion to this controversy that the formulary system was specifically legalized by the *Lex Æbutia*.<sup>1</sup> The statement of Gaius, that the *Lex Æbutia* and the two *Leges Juliae* suppressed the *legis actiones* and substituted for them a system of written state-

<sup>1</sup> Probably 170 B.C. But it has been placed as early as 300 B.C., and as late as 100 B.C.

ments<sup>1</sup> is of doubtful accuracy, for he himself says later that in the case of threatened damage, and in an action that belonged to the centumviral court, the *actiones* did continue; and this was the case until the time of Diocletian. But the advantages of the formulary system, and the steady increase of the prætorian law, left the *legis actiones* to be applied to only a few exceptional cases.

The method by which the formulary system was applied was characteristically Roman. Throughout the Republic, the proceedings began only when the plaintiff had succeeded in getting the defendant before the prætor, when the latter could commence the proceedings by informing the defendant what particular formula he thought appropriate to the case. This was the *editio actionis*<sup>2</sup> and was followed by the plaintiff's demand for an action.<sup>3</sup> The defendant could not then deny the facts, that could be done only at a later stage; but he could put in a demurrer. The lawsuit proper, according to the Roman notion, began when the prætor gave the formula. This was the beginning of the action, the *litis contestatio*.

The formula consisted of four parts; the *demonstratio*, the *intentio*, the *adjudicatio*, and the *condemnatio*; although any particular formula did not necessarily comprise all four. Sometimes the *intentio*, which was essential, stood alone; for example, in a case when the question turned on whether a certain person was enfranchised. Sometimes the *demonstratio* and the *intentio* are found together; but only the *intentio* ever stood alone.<sup>4</sup>

The *demonstratio* was that part of the formula of which the main object was to point out the matter in question in the action; as, "Whereas Aulus Agerius has sold a slave to Numerius Negidius."<sup>5</sup>

<sup>1</sup> *Effectumque est ut per concepta verba, id est per formulas litigemus.* Gaius, *Institutes*, IV, 30.      <sup>2</sup> D. 2, 13, 1, pr.      <sup>3</sup> D. 3, 1, 1, 2.

<sup>4</sup> Cf. Gaius, *Institutes*, IV, 39-44.

<sup>5</sup> Aulus Agerius and Numerius Negidius are the John Doe and Richard Roe of Roman law.



The *intentio* was that part in which the plaintiff stated his claim or the subject of the action; as, "If it appears that N. N. ought to give to A. A. ten thousand sesterces," or, "Whatever it may appear that N. N. ought to give to, or do for, A. A."

The *adjudicatio* was that part of the formula by which the *judex* was empowered to render judgment in favor of such party as he should think fit; as, in the case of the distribution to co-heirs of an inheritance, or the division of property held in common, or the settlement of boundaries, the formula ran thus, "Whatever is due to Titius, O *judex*, adjudge to him."

The *condemnatio* was that part of the formula which conferred upon the *judex* the right to condemn or absolve, as, "O *judex*, condemn N. N. to pay to A. A. ten thousand sesterces; but if it appears that he ought not to do so, absolve him."<sup>1</sup>

A characteristic feature of the formulary system was the changed position of the *judex*. He became merely the subordinate of the prætor; he must find as the prætor directed,—that is to say, his findings must be within the limits laid down in the formula given him by the prætor. The formula was entirely within the control of the prætor, and might be modified in a multitude of ways, so as to control the result of the action. The natural result of this assumption of power on the part of the prætor was to deprive the work of the *judex* of all significance and to retain the whole process within the hands of the magistrate himself. This extraordinary form of procedure finally absorbed the ordinary form and became the only method; during the Empire the distinction between *in jure* and *in judicio*, with all that it implied, disappeared, and the way was opened for the modern conception of the lawsuit. As long as it remained within the hands of the prætor — a period of nearly five centuries — his power

<sup>1</sup> Cf. Gaius, *Institutes*, IV, 39-43.

to grant or refuse actions, or to grant them under such conditions as to make the granting little better than a refusal, was a most important legislative power. This power was exercised principally through the conditions and modifications which were introduced into the formula, and especially in the *condemnatio*.

These changes were brought about, first, by the *exceptiones*, which were for the most part conditions not included in the strict letter of the law, but founded on equity, whereby the defendant might have a ground of defence; secondly, by the *actiones arbitrarie*, through which was obtained greater pecuniary satisfaction than was allowed by the strict letter of the law. The former restricted the powers of the *judex* in regard to the *condemnatio*; the latter enlarged them. Under the latter, the *judex* could give a more equitable amount of damages than had hitherto been possible; under the former, injustice could no longer be done under cover of the law. Of the two classes, the *exceptiones* were the more important.

The *exceptiones* were based upon the contrast, and even contradiction, between equity and good faith on the one hand, and on the other of legal rights based upon a rigid and to a large extent antiquated law. Under the old law a *stipulatio* was binding, even if accompanied by fraud. Money might be promised on conditions which were not fulfilled; yet so binding was the *stipulatio* that the non-fulfilment of the conditions did not defeat the action brought to recover the sum promised. Again, the debtor might obtain a release from the creditor by an informal agreement not to sue, a *pactum de non petendo*; nevertheless, by the strict civil or statute law, the right of the creditor to recover was not affected; the release was void. In such cases, the prætor inserted in the formula a statement to the effect that the finding for the plaintiff should not take place if the facts alleged in the *exceptio* — which was a part of the *condemnatio* — were shown to be true,

even although the facts in the *intentio*, as set forth by the plaintiff, were also true. In the same way, *exceptiones* were allowed for many other reasons, such as fraud, intimidation, or a compromise — conditions which were wholly omitted by the old civil law. In this way, the *exceptio* was a plea good in the prætorian law, but bad in the civil law.

Among the many *exceptiones*, by far the most important was the *exceptio doli*. It was by means of this that much of the Roman Law was developed by the prætor, and later by the juriconsults. It appeared in two forms, which in modern times have been distinguished as general — that is, applying to fraud as commonly understood — and special, as applying to the particular form of bad faith or fraud involved in the suit brought. The first form would cover a great number of cases, and was made to apply equally to cases of contracts made under duress, and to suits brought after release had been given. In this way, the whole case could be considered from the equitable point of view, and all the facts could be taken into consideration. Such an *exceptio* was made to cover counter-claims in the form of a lien or a set-off, and to enforce the spirit, or true sense, rather than the letter, of a promise. It was of almost universal application, and enabled the defendant to bring forward any facts which might tend to free him from obligation. "It was this breadth of scope that fitted the *exceptio doli* for becoming, above all things, the instrument that was used, both in the theory and practice of Roman Law, for effecting such modifications of the material law as equity seemed to require."<sup>1</sup>

The *actiones arbitrarie* were also directed toward affording relief not granted by the strict letter of the law. The meaning and purpose of this innovation upon the older methods of procedure were involved in the form taken by the verdict in allowing the claim of the plaintiff. This

<sup>1</sup> Sohm, *op. cit.*, p. 203.



was in the form of a sum paid to the plaintiff, and had been fixed at the amount of damage actually suffered. But there were many cases in which the actual value of the article in question was not a satisfactory compensation for the wrong. A man might sue for the restoration of property and lose the property by winning his case, inasmuch as the defendant was merely condemned to pay the value of the property; whereas what was wanted by the plaintiff was the enforcement of his right of ownership. This was merely one of many instances in which the finding of the *judex* would be inadequate. In the procedure by *actiones arbitrarie*, on the other hand, the *judex*, if he found for the plaintiff, commanded the defendant to restore the property. On his contumacious refusal, the plaintiff made oath as to the value to him of the restitution of his right of possession, and the amount of damages was fixed accordingly, generally at a very much larger sum than that representing the value of the property in question. In this manner the contumacious defendant was brought to surrender the property. The same course was taken in many other cases in which the mere pecuniary compensation bore little or no proportion to the actual wrong inflicted, or in which the end sought was not the liquidation and payment of a claim, but the performance of a specific act.<sup>1</sup>

The interdict has not unnaturally been regarded much in the same light as the English injunction, inasmuch as it was a command prohibiting a certain specific act. But — except in the early period — it differed from an injunction in that it was not enforced by a penalty. It was rather a method of procedure, beginning with notice to the parties to the suit of the administrative rule which the prætor would follow in the matter. At first it had been no more than a prohibition issued by the prætor as a part of his

<sup>1</sup> For an admirable account of the formulary procedure, see Sohm's *Institutes of Roman Law*, §§ 36-43.

administrative authority, or *imperium*, and was concerned more with matters of public than with those of private law. Questions touching navigable rivers, drains, reservoirs, roads, and public property in general, were frequently dealt with by interdict in the early republican law, and they were thus protected from trespass. The prætor's interdict furthermore forbade any interference with those who used or enjoyed public property, or were employed in caring for it. The next step was to forbid the infliction of private wrongs, or interference with private property rights; these were at first forbidden because of public policy. All such interdicts were a part of the prætor's extraordinary jurisdiction, and were administrative, not judicial. But when the business of the prætor became so great as to render it impossible for him to personally decide cases, the course taken by an interdict was in no essential different from that of an action, and the two forms finally became practically indistinguishable. Instead of being issued for each particular case, the interdicts were drawn up in hypothetical form and published as applicable to any similar case, and they had the effect of merely stating the law.

#### SECTION IV.—RISE OF THE *JUS GENTIUM*

The enormous power placed in the hands of the prætor by the formulary system of procedure and the corresponding changes thereby wrought in the law, were the work of many years. This work grew out of the *imperium* of the prætor, and followed the general principles that governed the exercise of administrative authority. For instance, it grew to be the custom for a magistrate to announce the principles which would guide him in the exercise of his authority during his term of office. This announcement usually took place at the beginning of the term, and although it was not until after many years that the prætor was bound by law to abide by his statement, yet he was

regarded as in honor bound thereby. In this way arose the practice of each prætor publishing an edict which gave a list of the actions which he would allow and the formulæ which he would grant. This was a most important method of legislation, for new rights, which could be enforced, were thus created. At first very few actions were granted; but as time went by the number grew, and the published edict became longer each year. The prætorship was the highest position to which a lawyer could aspire. The prætor was the supreme judge. He came to his office after undergoing years of training, during which he had been imbued with the most scientific and progressive legal learning. He had practised law under the older edicts, and had mastered their principles. When, therefore, he himself came to occupy the high office of prætor, he accepted a large part of the edicts of his predecessor, adding but few new clauses. That part which he received from the late incumbent, the *edictum tralaticium*, was always greatly in excess of that which he added, the *nova edicta*. Thus grew up the vast body of prætorian law, and it was rendered all the more important by the fact that the *tralaticium* remained in the edict and was modified only by the slightest additions; made important, also, by the fact that the *Lex Cornelia* of 67 B.C. made it illegal for the prætor to disregard his edict. Because this edict was not intended for a temporary emergency, but for the whole year of office, it was known as the *edictum perpetuum* — a name which was later used with entirely different meaning.

The advantage of legislation by means of edicts over legislation in the *Comitia* was very great. First of all, it was skilled legislation, because of the legal training of the prætor; then, it was easily effected, because the cumbersome machinery of the *Comitia* was not needed. It was possible in some degree to experiment with a new remedy. Its force would last for only one year, in which



time it could receive trial, and its repeal, if it proved a failure, was as easy as its enactment; the next prætor had only to omit it from the edict. In the hands of a demagogue, the edict would of course have been a dangerous weapon for an attack upon vested rights; but it was the most valuable means ever known for the development of law, and to it Roman Law owes a large part of the perfection which it attained.

The first prætor was appointed in 367 B.C. At this time the commercial relations of Rome, although by no means as great as they became in the course of the two succeeding centuries, were yet extensive. Certain civil rights, or *commercium*, were enjoyed by a large number of the aliens of those nations which traded at Rome, such as the Carthaginians; and Romans at Carthage were in turn granted the same privileges. In this way aliens, in their commercial dealings, were given the protection of the law. But after the middle of the third century B.C. and the enormous growth of Roman power, the condition of the alien changed. The Romans conquered the surrounding nations and incorporated them in their own dominions, without according them civil rights. The Republic was unwilling to make new commercial treaties with other nations. The alien was thereby reduced to a miserable condition. But the demands of commerce have always modified law to suit its ends. The growing wealth and luxury of Rome made it inexpedient to treat unjustly the aliens, who were in many ways becoming necessary to the Romans. This led to the appointment in 242 B.C. of a second prætor. He was the *prætor peregrinus*, and had jurisdiction in the case of aliens. He was to decide all disputes between foreigners, as well as those between Romans and aliens.

The appointment of the *prætor peregrinus* introduced an entirely new element into the Roman law. It was due to the *prætor peregrinus* that the formulary system at-

tained its importance. His edict became the most important part of the edict of the other prætor, the *prætor urbanus*, who had cognizance of all disputes among Romans, and who was accustomed to adopt the edict of his fellow-prætor. Of the two edicts, that of the *prætor peregrinus* was the more progressive; in fact, it took the lead from its inception, because this prætor had to devise new remedies, the older remedies of the *legis actiones* being entirely inapplicable. These held good only among Roman citizens, and it was abhorrent to Roman pride to employ them in case of aliens. The prætor was therefore forced to look elsewhere than to Roman law for the principles which should guide him in the exercise of his authority.

✓ The laws of business are for the most part uniform throughout the business world; and for that reason the laws current among the alien residents of Rome made up a body of reasonably uniform law. It was based upon natural justice and equity; but it was not adopted by the prætor for that reason alone. It was adopted because it was the law which was common to the various nations with which Rome had come into contact.

In saying that the law which the *prætor peregrinus* embodied in his edict was the law common to all nations with which Rome had come into contact, the key is given to the enormous superiority of the *jus gentium* over the *jus civile*. The former omitted all the distinctively ceremonial acts and all forms prescribed as essential to the validity of a transaction. In every act, it was forced to grasp the fundamental idea and treat it as the essential element. It was compelled to become a system of equity, whereby the law embodied in the prætorian edict became generally acceptable — not because of any enactment or prestige, but solely because it was in harmony with the common instincts of justice, and was thoroughly adapted to the business conditions of the time.

In later days, it was a favorite idea of those Roman

lawyers who affected the Stoic philosophy to compare the *jus gentium* to the *jus naturale*, or those fundamental juridical ideas which are common to men, because instinctive, — the law of nature, as it appears in all races. Such a notion was entirely remote from the more practical minds of the early prætors. The *jus naturale* might be more or less faithfully represented, at least in parts, by the *jus gentium*; but the latter was merely that common body of usages which had arisen from the amalgamation of different systems and the developments of that body.

Although the *jus gentium* was derived from non-Roman sources, it was nevertheless Roman law. It was not a private code, a mere agreement among resident aliens; it was the law of the land that applied to aliens, and according to which they lived and held and enjoyed rights. It was administered by Roman authority, and was in no respect dependent for enforcement upon the source from which it was originally derived. The introduction of foreign elements of known origin — such as the Rhodian maritime law, and *emphyteusis* and *hypotheca* — was probably brought about by those who had at some time ruled in the colonies where these laws were in force, and who had later been elected to the prætorship; but when such principles were once embodied in the edict, they became as essentially Roman as any enactment of the *Comitia*.

The *jus gentium*, as it appeared in the edict of the *prætor peregrinus*, primarily applied to dealings between aliens who were natives of the same city or country — the laws of which could of course not be enforced at Rome; — aliens natives of two different cities or countries — when the rights acquired under each system had no common meeting point; — and Romans and non-Romans, who had no common legal ground. It was based upon the personality of law, an idea which runs throughout ancient law and finds its extreme expressions in the Gaul of the Merovin-



gian dynasty. With the downfall of the older *commercium*, which aliens had enjoyed before Rome became a world-conquering power, and with the rise of the Roman authority as dominating subject nations, the multitude of local systems of law and the threatened confusion arising from the retention of personal law were replaced by the adoption of one system for all. The world was made up of Romans and non-Romans. Further distinction was unnecessary. As a natural result of its inherent equity, the *prætor urbanus* incorporated in his edict a great deal of the edict of the *prætor peregrinus*. At a comparatively early period the two edicts became practically one, and Roman Law was consequently enriched.

The edicts of the provincial governors were of a similar nature to those of the prætors. The edicts of the *prætor urbanus* applied only to Romans, and those of the *prætor peregrinus* to aliens resident in Rome. There would therefore be opportunity for some such enactment or proclamation by the various provincial governors, who combined judicial with administrative functions. It would be a part of Roman custom for such a governor to issue his edict, or declaration of principles, on his assumption of office; and the limitations which bound the prætors at Rome to rigid adherence to the edict would be binding on him as well. The provincial edicts were to a large extent modelled upon those of the prætors; and although there was in them no extension of the applicability of the prætorian law, yet as *jus honorarium*, — or law deriving its authority from the magistrate who pronounced it, and who had the *jus edicendi*, or right of stating the law, — they had a wide diffusion throughout the vast domain of the Roman Republic.

It was in the last century of the Republic that the prætorian edict attained its greatest importance as a factor of progress in the Roman Law. With the rise of the imperial authority, the independent position which the prætor

had so long held became incompatible with the power which had gradually been concentrated in the hands of the prince; and the prætor consequently became of less and less importance. The edict was issued each year; but this was little more than a formality. Little was added to the law; still less was taken from it. Imperial wishes modified it to some slight extent; but its vitality was gone. The end came when the Emperor Hadrian, in 129 A.D., caused the edicts of the *prætor urbanus* and the *prætor peregrinus* to be revised and, together with the edict of the curule ædiles, to be ratified by a *senatusconsultum*. Thenceforth the development of Roman Law was undertaken by other and freer hands than those of the prætors.

#### SECTION V. — LAW OF THE LATER REPUBLIC

It must not be thought that the prætorian edict was the only source of new law in the Republic. The rapid changes in the condition of society brought about the introduction, or creation, of a vast amount of customary law. It was this that gave force and significance to many of the prætorian formulæ. The question as to what constituted good faith in a given transaction could be answered only by an appeal to the custom which prevailed regarding such transactions. The *judex* to whom the case was remitted for decision applied the customary law as he knew it. His decision was binding upon the contestants in that particular case; but it was not binding upon another judge in a similar case. Yet such decision went far to render the custom more fixed and obligatory, until it would attain the force of a law and be generally recognized as such.

The efforts of the lawyers to expound and apply the principles of the law also contributed to its development. At first, such exposition, or *interpretatio*, was the exclusive privilege of the sacerdotal college; and the patricians long enjoyed a monopoly in expounding the law. In preparing

the proper form in which to bring a suit, an interpretation was needed; and this became very important as modifying to a marked extent the *jus civile*. Cn. Flavius put an end to the monopolistic treatment of the law by the publication of the list of days on which judicial procedure was allowed and of the various forms of action. In future, no secrets for the benefit of the privileged class were to be kept from the knowledge of the common people. Those lawyers who were learned in the law, and not merely members of a sacerdotal college, began to give advice as to the law. Tiberius Coruncarius, the first chief pontiff chosen from the plebeian class, is said to have been the first to do this publicly;<sup>1</sup> and the compilation of Sextus Ælius Pætus, consul 197 B.C., which contained the Twelve Tables, the *interpretatio* down to date, and the forms of actions, was the first systematic attempt to produce a code of the *jus civile*. The last century of the Republic was full of the fame of lawyers, although the Golden Age of Roman jurisprudence had not yet arrived. Among those lawyers whose names have come down to us may be mentioned those of the two Catos, father and son; M. Manlius, who wrote a treatise on contracts; and Quintus Mucius Scævola, the instructor of Cicero.

The most important changes effected in the legal system of the latter part of the republican era were the new law of possession, the law of contract,—growing out of the *stipulatio*,—and the law of succession. Domestic relations, the other great division of the law, may be dismissed with the observation that the acquirement of *manus* became less and less an important element of marriage, and that the *patria potestas* lost something of its ancient rigidity.

*Sub-section A. Acquirement of Property.*—The change in the law of property may be treated in two parts: the law of acquirement, and the law confirming possession or retention.

<sup>1</sup> About 150 B.C.



The acquirement of property by simple *traditio* had doubtless been customary from an early period. Simple articles passed from hand to hand without the cumbrous formality of the *mancipatio*. But the *res Mancipi* could not be thus transferred. It must be borne in mind that in the primitive life of early Rome there was little need for any elaborate law governing the informal transfer of property. But with the growth of commerce, and especially commerce with aliens who might not use the ceremony of mancipation, the informal delivery, or *traditio*, compelled recognition. It was not a mere matter of convenience; it was a matter of right or title, and was a part of the *jus gentium*. The meaning and motive of this form of delivery is well stated by Justinian in his *Institutes*. He says: "By delivery also, according to the *jus naturale*, we acquire property. For nothing is so agreeable to natural fairness as that the wish of the owner who desires to transfer to another that which is his should be held valid."<sup>1</sup>

*Occupatio* was a means of acquiring ownership of those things which belonged to no one, *res nullius*. Thus, as there was no property in wild birds, fish in the water, or wild beasts, the only way to gain a right of ownership in them was to take possession of them. It made no difference that the land on which the beast, bird, or fish was taken belonged to another than the person taking. The latter had indeed no right to enter upon the land; but this did not affect his right to the game taken by him. The game was originally *res nullius*; it was acquired by *occupatio*, and became legally his. But by *res nullius* should not be understood everything that belonged to no one; for such were property dedicated to the gods, things sacred, and the like, and although these were, in a sense, *res nullius*, yet they could not be acquired by *occupatio*. *Res nullius*, with the above exceptions, may be defined as including that which existed in a state of nature — such

<sup>1</sup> J. Inst., II, 1, 40.

as wild creatures, gold, silver, precious stones, and other minerals; lands which had never had inhabitant or owner; and things relinquished with the intention of abandoning ownership, or which, in the case of treasure-trove, had been so long abandoned that the owner was not known. The property of an enemy to the State was similar to a *res nullius*. As such enemy had no rights to be respected, he had no ownership, and merely taking possession of his property was sufficient to give title.

Closely connected with *occupatio* was the third form of acquiring a possession that was equivalent to ownership; this was *accessio*. This was not acquirement of ownership in something which belonged to no one, but in something belonging to some one; and that too without *usucapio* or *traditio*. It was based upon the distinction between that which was principal and that which was only accessory. Thus, the paint upon a house could not be removed therefrom; it had become a part of the house. The paint, as soon as it was applied to the house, belonged to the owner of the house, although, if unpaid for his work, the painter might sue and obtain compensation. A man might plant in his own soil a shrub which belonged to some one else. As soon as the plant had taken root, it belonged to the owner of the soil. A stream might bring down soil and that soil attach itself to a new place; the land thus formed belonged to him who owned the bank on which the soil last rested. This principle of *accessio* may be traced back to the provision of the Twelve Tables whereby a man was not obliged to remove from his own house the beam belonging to another, which he had built into it. Because it had become a part of his house, it was his; but the former owner of the beam could obtain compensation.

The law was elaborated to considerable extent, but the simple principle, which applied in many cases, was abandoned where that which was only accessory from the standpoint of matter was principal from the standpoint

of importance and value. Thus, a picture painted on a surface belonging to another than the painter was held to be the property of the latter. "For it is hard," says Gaius, "that a picture by Apelles or Parrhasius should go as a mere accessory to a most worthless surface."

*Sub-section B. Protection of Possessory Rights.* — Yet more important than the forms of acquiring title were the rules by which those in possession were maintained therein. These rules converted mere possession into ownership, and created a large number of rights. Two points of the new law may be cited as illustrating the general progress of jurisprudence. These are the *Actio Publiciana* and the interdicts.

The *Actio Publiciana* was introduced in the last century of the Republic. Its effect was to give a right of bringing an action to recover possession, when the property had not been acquired by either *mancipatio* or *in jure cessio*, and the title had not been perfected by prescription, or *usucapio*. In this law, the owner is considered by a fiction as having acquired his title by *usucapio*, and in the formula in which the case is given to the *judex* the *intentio* is worded accordingly, as, "Let there be a *judex*. If the slave that Aulus Agerius bought and had delivered to him has been in his possession for a year, if in that case, the said slave, about whom the action is brought, would be his *ex jure Quiritium*, and so on."<sup>1</sup> By that fiction the purchaser was protected; he was practically the owner. He did not indeed possess "Quiritarian" ownership, and could not transfer his property by *mancipatio* or by *in jure cessio*; but he could transfer it by *traditio*, and the purchaser was, by the *Actio Publiciana*, protected in his possession.

The wording of the passage in the prætor's edict upon which this action was founded was as follows: "If any one demands that which was delivered to him on some lawful ground, and of which he has not obtained ownership

<sup>1</sup> Gaius, *Institutes*, IV, 36.



by *usucapio*, I will grant him an action." This did away with the necessity of *usucapio* to justify the retention of possession. It did not constitute a valid defence against the real owner, as in the case of things stolen, but which had been acquired from the thief in good faith. But it made the title of the possessor good against all the world except the rightful owner.

This action was the basis of what has been called *bonitarian* ownership, as distinguished from Quiritarian ownership. The distinction is thus pointed out by Gaius: "If I simply deliver to you a *res mancipi*, and do not convey it to you either by *mancipatio* or *in jure cessio*, though it becomes yours *in bonis*, I still retain Quiritarian ownership until you by lapse of time obtain Quiritarian ownership by *usucapio*, when both rights become consolidated and vested in you."<sup>1</sup>

A second form of protecting possession which was not full ownership was by means of possessory interdicts. Of these the most important were those respectively entitled *uti possidetis* and *utrubi*. The former applied to immovables, the latter to movables. The origin of these interdicts has been traced to the occupation of the *ager publicus*, or land belonging to the State. There could be no private ownership of such lands; but the possessor might be maintained in undisturbed enjoyment of his holding by means of a prohibition addressed to any who attempted to oust him. The same condition in respect to land extended to the *peregrinus*. He could not acquire land by *mancipatio* or by *in jure cessio*, and the legal owner might drive him off. By protecting mere possession, therefore, the occupant of the *ager publicus* was given all that was necessary for the full enjoyment of the land; while in the case of the *peregrinus*, he would be able to enjoy possession of land with rights almost equivalent to those of full ownership.

<sup>1</sup> Gaius, *Institutes*, II, 41.

In the action to which the interdict gave rise, the parties were not regarded in the early stages of the suit as plaintiff and defendant; they were regarded as two parties quarrelling as to possession, and the interdict was addressed by the prætor to both. In the course of the action, if there were no fruits, profits, or income arising from possession, immediate possession was given to the possessor at the time of the interdict, unless he had used fraud, or force, or held only of the other party by precarious tenure—that is, by a tenure revokable at will. The claim of ownership was of no avail; an actual possessor could not be dispossessed. In case there were profits arising from possession, the immediate possession was given to the party who bid in open court the highest amount for that privilege. The refunding of the money thus advanced was provided for by a special *stipulatio* between the parties. When the question of immediate possession was settled, the suit proceeded to a decision.

Possession according to the interdict called *utrubi* was decided upon a different principle from that of the *uti possidetis*. The party who had held the property for the greater part of the preceding year—provided he had not obtained possession by force or fraud, or did not hold by precarious tenure—was given possession. The year was reckoned backward from the date of bringing the action. In the later law of the Empire, the two interdicts named became identical in method of procedure. That party prevailed who was in possession at the time the interdict was issued, unless he could be shown to have gained possession by means of one of the exceptions above stated.

The full force of these forms of acquiring a legal possession—which became ownership when maintained by the decision of the prætor—was by no means confined to the *peregrinus* and the occupant of the *ager publicus*. It so operated in the law of succession that the old rule was thoroughly modified by the prætor; and that too without

violation of the old rule that the prætor could not make an heir.

*Sub-section C. Prætorian Succession.*—The fundamental idea of the Roman law of succession was that the heir, or *heres*, became the representative of the deceased. In the eyes of the law, he was subject to the same duties and possessor of the same rights. According to the *jus civile*, the estate was known as *hereditas*, and the universal successor to that estate as the *heres*. The prætorian law instituted, under another name, that which was equivalent to the same relation. The estate was known as *bona*, and the universal successor was known as *bonorum possessor*. His rights and duties were the same as those of the *heres*, and it was by no means uncommon for the legal heir to rely entirely upon the title given him by the prætor as *bonorum possessor*, because of the opportunities of bringing action involved in that title.<sup>1</sup>

The importance of the recognition of the principle of the *bonorum possessio* lay, first, in the fact that the prætor could thereby recognize testaments that were not strictly legal, provided they complied with certain rules which he himself laid down; and, secondly, in the change which he was able to make in the order of succession. In regard to the former, the prætor could in time introduce almost any form of testament. As a matter of fact, however, he adhered very closely to the *jus civile*. In the older Roman law, the testament took the form of a sale by *mancipatio*. The new prætorian testament required indeed the presence of the same number of witnesses, the *libripens*, and the *familiæ emptor*; but their functions became merely those of witnesses to a will. The prætor announced that he would grant *bonorum possessio* to the heir mentioned in a will, provided seven witnesses had signed and sealed it. In this way, the will and its contents were maintained, inasmuch as otherwise all the provisions of the will — by

<sup>1</sup> Cf. Gaius, *Institutes*, III, 34.



the former law — fell to the ground on the failure of the *heres*. Without him, the juristic personality of the deceased was not continued.

In the matter of succession, the prætor was able to materially modify the effect of the harsh provisions of the Twelve Tables. The early law was strictly founded upon the idea of the legal family. This had reference to the position of a person under the *patria potestas*, not to blood relationship, as the basis of union. Among the hardships resulting from this conception Gaius points out the following:—

“Emancipated descendants had no rights as to the estate of their ancestor, because they had ceased to be *sui heredes*.<sup>1</sup>

“Agnates, again, who have undergone *capitis diminutio* are not admitted to the inheritance according to that law; for by *capitis diminutio* the title by *agnatio* is destroyed.<sup>2</sup>

“Again, when the nearest agnate declined the succession, those next in order were not admitted.

“All female agnates who were not also *consanguini* had no right of succession under the law.

“So cognates having a common female ancestry were excluded. The effect of this was that even between a mother and her son and daughter, the right to inherit was not allowed either way, unless by a subjection to the

<sup>1</sup> Inasmuch as such descendant had once been under the *patria potestas*, he had had, as part of the family, a certain right in the estate. But by emancipation he ceased to be a member of the family, and the right, which would otherwise have been called to life by the death of the ancestor, could not become his by such death.

<sup>2</sup> *Capitis diminutio* was of three kinds: (1) loss of freedom, by being reduced to slavery; (2) loss of citizenship, unaccompanied by loss of liberty, as when a Roman citizen emigrated to a Latin colony; (3) severance from one's agnatic family, as when a daughter by marriage passed under the *manus* of her husband, or when a son was emancipated by his father, sold into bondage, or given in adoption, or when a person *sui juris* allowed himself to be adopted. In every case, the person suffering *capitis diminutio* was cut off from his legal or agnatic family.

*manus* of her husband the rights of consanguinity were created between them.”<sup>1</sup>

The changes introduced by the prætor were based upon the conception of the family as founded upon blood relationship rather than upon purely legal relation.

All children, even those who had not been in the *patria potestas* of the father at the time of his death, were first called by the prætor to the succession. There was no distinction between children who were *sui heredes* according to the civil law. But the emancipated children who were thus placed upon a footing with the *sui heredes* were required to put their own property into the corpus of the estate, just as if they had not been emancipated.

Next in order to the children *sui heredes* were the agnates and others who were especially entitled by law to succeed, together with all children who had neglected to perfect possession within a year. If an agnate entitled to the inheritance declined it, the agnate nearest to him succeeded. *Capitis diminutio* did not extinguish this right; but if there was another person with unimpaired title by agnation, he was preferred to one suffering *capitis diminutio*, although his kinship might be more remote.

In the third place the prætor called to the succession the next of kin, that is to say, the cognates. In this way succession through the female line was recognized.<sup>2</sup> And in the fourth place husband or wife succeeded one another, when the wife was not *in manu*. A wife *in manu* was *in loco filix*, and therefore would be one of the *sui heredes*.

In all these cases the prætor gave *bonorum possessio* to those whom he called to the position of heir, though, as is explained, he could not make the heir. The heir might be one or several; but the succession was in all cases universal. The property was not immediately divided

<sup>1</sup> Gaius, *Institutes*, III, 19 ff. That is, the mother became a quasi-sister to her own children.

<sup>2</sup> Cf. Gaius, *Institutes*, III, 26 ff.

among the heirs. The heir appointed by the prætor could not sue by any *legis actio*; only by a fiction could he collect the debts due the estate. Compare the *intentio* given by Gaius: "Let there be a *judex*. Supposing Aulus Agerius, the plaintiff, were the civil heir of Lucius Titius; if, on that supposition, it be proved that the land in question ought to be his by Quiritarian law," etc.<sup>1</sup> Herein was an entirely satisfactory defence for the *bonorum possessio*, which thereby became to all intents Quiritarian ownership. When possession was once obtained, either with or without suit, the title was perfected in one year by *usucapio*. Thereafter the *legis actiones* were available to the possessor.

Thus, by the exercise of prætorian authority, the testament assumed an informal and convenient shape, and blood relationship was substituted for legal relationship, or *agnatio*.

*Sub-section D. Prætorian Contracts.*—The fourth great change introduced by the prætor was the remarkable development given to the *stipulatio*, whereby the law of contract was greatly elaborated. The earliest Roman contract was the *nexum*. It was accompanied by some of the ceremonies of the *mancipatio*. It was essentially the creation of a loan, for which the debtor pledged his person as security. It was developed by the law of the Twelve Tables whereby the *nuncupatio*, or verbal conditions introduced in the course of the ceremony, became binding upon the parties. The *stipulatio* was an advance beyond the ceremonial stage, although it retained a precise form of words and was not considered binding because of the consent therein expressed or from any mutual consideration, but only because a prescribed form of words was used. A third important form of contract was recognized by the civil law; this was the so-called literal contract. There is no little uncertainty as to this

<sup>1</sup> Gaius, *Institutes*, IV, 34.



latter form of contracts, but they seem to have been created by entry in domestic account-books, which, by order of the censor, were kept in every important Roman family. This custom developed into a species of book-keeping, whereby the record in the books of the contracting parties was regarded as a sufficient form of contract. The advantages arising from this form were, that debts and credits could be transferred from one hand to another, so that business could be transacted on a large scale with less ready money; and that this form, known as *expensilatio*, could be employed when the parties were not together, the lack of which condition was one of the defects of the primitive *stipulatio*, and one which rendered it but little applicable to the demands of an extensive commerce. In this manner the commercial life of Babylon and Rome brought about a form of exchange which largely did away with the employment of actual cash. For this reason, in many cases stipulatory obligations were converted into literal contracts; and as early as the second Punic War the form taken began to be either that of promissory notes — *chirographa* — or duplicates of the contract — *synographæ*.

In addition to these formal contracts, there was a large number which derived their binding force from mutual consent. The inapplicability to aliens of the original form of *stipulatio* had forced the prætor to disregard the informality of a contract, and to acknowledge as binding any agreement in which the consent of both parties was expressed. This "meeting of minds" was the residuum found on analyzing the various forms of contract in use in the ordinary conduct of business among aliens. Out of the *nexum* had grown the older business forms, which were all expressive of a conveyance and debt; among these were the *depositum*, or deposit for preservation; the *commodatum*, or gratuitous loan, granting the use of, but demanding the return of, the specific object; the *mutuum*,

or loan which might be returned in kind, as money; and the *pignus*, or pledge. All these transactions consisted of the delivery by one person to another of some object, thereby imposing some duty upon the recipient; and because connected with some object (*res*), they were known as real contracts. The obligation was not dependent upon the use of any form of words or ritual acts, but solely upon the act or fact involved. All these forms of contract were of prætorian origin, and acquired their legal force from the prætor's announcement that he would grant an action to enforce them. Thus, in the case of the *commodatum*, the edict contained these words, "The prætor says, If any one is said to have loaned anything free (*commodasse*), I will give an action for it."<sup>1</sup>

The new forms of contract were consensual, and were the following: purchase and sale (*emptio et venditio*); letting and hiring (*locatio et conductio*); partnership (*societas*); and agency (*mandatum*).<sup>2</sup> In these, no prescribed form of words was required, nor was reduction to writing necessary. The contracts were *bilateral*—that is, both parties incurred reciprocal obligations to perform whatever was fair and equal; whereas verbal and literal contracts, and real contracts, were *unilateral*—that is, conferred only a right upon one party and an obligation upon the other.

The contract of purchase and sale was complete as soon as the price was agreed upon, and before the earnest money or price was paid. The earnest money was merely evidence of the completion of the contract. The price had to be definite; it must be in money, and must not be a mere fiction.

Letting and hiring were governed by the same rules as purchase and sale, and in some cases—as leases in perpetuity, as in the case of land belonging to municipalities—the distinction from sale was but slight. The distin-

<sup>1</sup> D. 13, 6, 1.

<sup>2</sup> Cf. Gaius, *Institutes*, III, 135 ff.

guishing feature was that one person (*locator*) agreed to give another (*conductor*) the use of something, or to perform some work for him, in return for a definite sum of money.<sup>1</sup>

Partnership was the contract by which two or more persons combined their goods, or labor, with the intention of sharing the profits of a commercial transaction. The partnership might include all the parties' goods, or only a portion, as determined between them. Its continuance depended upon the continuing consent of the parties, but it could be dissolved by the renunciation of either party. In case of death it was self-dissolved — inasmuch as it was a partnership with a determinate person — and this was also the case if civil status was lost (*capitis diminutio maxima*, or *magna*), because in the eyes of the civil law this was equivalent to death.

Agency was the only gratuitous consensual contract. In later law an honorarium, as agreed upon, and even a salary, was allowed; but in the republican period, and until after Gaius, the contract was perforce gratuitous. A *mandatum*, or agency, might be either for the benefit of the principal or for that of a third party, the form being, "Your undertaking at my request to transact my business or the business of a third person will create an obligation between us, and make us mutually liable: me for your expenses, you for good faith toward me." The law of agency was but slowly developed in Roman jurisprudence. The agent contracted in his own name, and was sued as principal; the real principal could sue only by permission of the agent. But by degrees the agent came to be regarded as only the representative of the principal; and when an agent, acting in the interest of his principal and according to his instructions, made a contract, the consent of the agent was not required to enable the principal to sue.<sup>2</sup> This was the limit of the extension of the Roman

<sup>1</sup> D. 19, 2, 1.

<sup>2</sup> D. 3, 3, 68.



law of agency, and was attained only after much hesitation on the part of the prætor.

The further extension of the idea of contract covered two classes, the innominate real contracts, and the pacts or informal agreements. The innominate contracts were classified under four heads, as follows:—

- (1) *Do tibi ut des*: I give that you may give.
- (2) *Do ut facias*: I give that you may do something.
- (3) *Facio ut des*: I do something that you may give.
- (4) *Facio ut facias*: I do something that you may do something.

The lawyers were eager to find analogies between these innominate contracts and the consensual contracts; and this was not difficult, as in many cases the distinction was very subtle.

The pacts, or informal agreements, were for the most part in the form of a release, or in modification of a contract already made. They were not directly enforceable by an action, but were regarded as valid grounds of defence against one. In the case of the *pacta adjecta*, or pacts modifying a contract, if the pact changed the nature of the contract the jurists regarded the modified contract as a new one, and as such enforceable by an action; otherwise it was merely a defence in the course of an action. In the later law, the doctrine of informal agreements, or pacts, was carried somewhat further; but it was never carried to its logical termination.

## CHAPTER IX

### THE LAW OF THE EARLY EMPIRE

#### SECTION I. — SOURCES

THE contrast between the republican and the imperial system was that between freedom and despotism. Yet the actual transition from one form of government to the other was accomplished by such gradual steps that the progress was imperceptible. The Republic, in such men as Pompey, had presented prototypes of the emperors; and the Empire retained with scrupulous fidelity the forms and institutions of the Republic. The policy of Augustus was to preserve as far as possible the traditions which were dear to the popular heart, and, by a crafty subserviency to the older customs, to assure the people that no essential change had been made by the establishment of the Empire. As Gibbon says, Augustus was sensible that mankind is governed by names; nor was he deceived in his expectation that the Senate and the people would submit to slavery, provided they were respectfully assured that they were enjoying their ancient liberty.

The concentration of all authority in the hands of the emperor was brought about by investing him with all the magisterial offices. The policy of division of authority which had obtained at the time of the expulsion of the kings, and which had been continued and extended, was reversed. All offices were given to one man; and, as perpetual consul, perpetual tribune, perpetual censor, and *pontifex maximus* he was in fact all that the kings had been, although he contented himself with the title of

Applies  
Today  
as well as  
in Augustus's  
time!

emperor and *princeps senatus*. It was not until after three hundred years that the monarchical spirit of the new government was fully revealed, and the republican forms completely swept away.

The immediate effect upon Roman jurisprudence of the concentration of authority in the hands of the emperor was the unification of all the law of the Empire. The emperor became the final court of appeal. From every portion of his vast dominion appeals were made to him, and every Roman citizen had the right of carrying his case to him as the court of last resort. The interpretation which he gave to the law was authoritative, and the various courts of the Empire were guided by his decisions. In this he was merely exercising the power which the *pontifex maximus* had enjoyed, and which devolved upon the emperor by his assumption of that dignity.

The second immediate effect of the authority of the emperor was the rapid decline of the power of the prætor to amend the law, and the reduction of the prætorian edict to a permanent form. The prætor no longer enjoyed the authority which had been his in republican times. There was over him a prince and a *pontifex maximus*, whose will, though carefully cloaked in discreet forms of utterance, was nevertheless absolute; and the old struggle between pontifical and prætorian interpretation of the law was again settled, this time by the assumption by a third party of the powers of both. The prætorian edict therefore ceased to be an important element in the development of law. It made few advances, its contents remained nearly unchanged, its promulgation was a mere form, and its final redaction under Hadrian was no loss to jurisprudence. Its original plastic nature had been lost, and it had ceased to be of any service to the science of law.

The sources of legislation under the Empire were four: the *Comitia*, as of old; the Senate; the emperor, through imperial constitutions; and the *jurisconsults*.



(1) *Comitia* were continued for a few decades. But the wholly changed condition of the Roman populace rendered the assembly of citizens almost impossible, and it was evident to all that the action of the *Comitia* was undesirable. The policy of Augustus, however, was very strictly to maintain the republican forms, and the *Comitia* passed several important laws. Under Augustus and succeeding emperors, there were passed the series of laws regarding marriage, which culminated in the *Lex Julia et Papia Poppæa*, passed in 9 A.D.; the series regarding manumission, which culminated in the *Lex Junia*, passed 19 A.D., under Tiberius; and the *Leges Juliae judicariæ*, regarding procedure, the date and purport of which are uncertain. After the passage of these, there was little or no legislation in *Comitia*, and the few exceptions are so doubtful as to emphasize the change which had taken place.

(2) The Senate, the second source of law, had for some time constantly encroached upon the province of the *Comitia*, and soon after the establishment of the Empire the former assumed the position of the sole legislative body. The *senatusconsultum*, passed at the request and on the motion of the emperor, obtained the same authority as had been possessed by the *leges*, which were the work of the *Comitia*. The authority of the Senate as a source of law was at its height from the time of Tiberius to that of Hadrian. After that period it rapidly declined, and the Senate became more and more a mere institution for registering the laws, which were in fact promulgated solely by the emperor.

(3) The emperor, the third source of law, issued constitutions, which were expressions of the *imperium* and the *jus edicendi*, which the magistrates had always enjoyed. They may be divided into four principal classes, as follows:—

(1) Edicts, which were public ordinances, of universal application throughout the Empire. These had the authority of laws, inasmuch as they were generally enforced and

applied to all. In the earlier reigns they were frequently renewed, and they derived their authority from the emperor, as the prætorian edict did from the prætor. Gradually they came to be held as permanently binding; the real ground of their permanent force — custom — was overlooked, and the imperial authority was regarded as such ground.

(2) Decrees, which were decisions in judicial cases brought before the emperor as final court of appeal. Inasmuch as they were interpretations of the law, they were regarded as binding upon all courts.

(3) Rescripts, which were decisions upon questions of law submitted by courts and private persons. They were closely connected with the pontifical interpretations.

(4) Mandates, which were directions to officials in the exercise of their offices. These, by repetition in the various instructions sent out from time to time by the emperor, became a source of general law. They were theoretically in force only during the lifetime of the emperor from whom they proceeded; but they became of permanent force because of repetition and of custom.

The fourth source of law were the juriconsults; they were certain lawyers who enjoyed the privilege of interpreting the law with the same authority as that of the emperor himself — the *jus respondendi ex auctoritate principis*. From this source came the *responsa prudentium*, or the interpretations of the law and answers given to questions submitted by courts. This was probably, in the whole history of Rome, the most important institution for the scientific development and interpretation of the law. It was much more important than was the prætorian edict, which was the means of adapting the law to the demands of commercial and domestic life. It was essentially founded upon the scientific study of the law, and was an invaluable means of keeping the actual practice of the courts in touch with the best legal thought of the time.

(4)

Roman lawyers had for several centuries occupied an important position as a distinct class. The pontifical college had at first done all that was necessary in expounding the law; but its expositions were always confined to the cases which were presented to it by the courts, and in them no attempt was made to state the law in its fulness. The patricians who composed that college jealously guarded the advantage which was theirs in the administration of the law. The plebeians, on the other hand, sought to deprive them of the legal monopoly they thus enjoyed. Accordingly, the first plebeian *pontifex maximus*, Tiberius Coruncarius (254 B.C.), was the first to announce his readiness to answer all questions which might be put from a merely theoretical standpoint. By this innovation, although the pontifical college did not lose its right to expound the law, the beginning was made of a distinct legal profession, and the interpretation of the law fell more and more into the hands of private jurists. By them the foundations of legal literature were laid. Various attempts were made to present the law as a whole. M. Porcius Cato the Younger (*ob.* 152 B.C.) attempted to reduce the law to a scientific system, and Quintus Mucius Scævola the Younger, about 100 B.C., wrote a great work on the *jus civile*, logically divided according to subject-matter. This period of activity was the point at which the mere knowledge of the law began to give place to the scientific study of jurisprudence.

The appointment, under the Empire, of jurisconsults to interpret the law was the end of the interpretation thereof by the pontifical college; and the custom of employing distinguished lawyers in this capacity, begun by Augustus, was continued by Tiberius — by whom was established the form by which the custom was regulated — and by his successors. The opinions delivered by these lawyers were binding on the judges: the magistrate before whom the case was brought and the *judex* to whom it was remitted.



These opinions, which at first were only applicable to the particular case under consideration, became extended in their application so as to constitute a vast mass of authoritative precedents. The contradictions which might appear between the opinions of differing jurisconsults were generally settled by the judge. There was not as yet the arithmetical enumeration of authorities which afterward prevailed.

By these four methods the laws of the Roman Empire were promulgated and interpreted, and by the interpretation they were developed and modified to such an extent as to become practically new laws. But the tendency of the imperial system was toward the monopolization by the emperor of all legislative authority. The *Comitia*, as pointed out, soon ceased to exist, and the Senate became less and less important. After the time of Hadrian, the right of proposing new legislation was the exclusive prerogative of the emperor. The *oratio*, by which bills were introduced into the Senate, became in the eyes of men the law itself, until, as Ulpian says, *quod principi placuit, legis habet vigorem*. Even the importance of the *jus respondendi* declined, and the interpretation of the law was reserved to the emperor. All this was the preparation for the second stage of the Empire: the monarchical, as distinguished from the princely authority. The despotism of Diocletian and of the Christian emperors, although the result of the conditions manifest throughout the early Empire, were in many respects radically different.

## SECTION II. — RISE OF THE LEGAL PROFESSION

The influences and circumstances which brought about the brilliant period of jurisprudence in which the names of Papinian, Ulpian, and Paul are the most notable, may be divided into two general classes: those external circumstances which affected the body of lawyers as a whole, and

those internal influences which modified the science of jurisprudence itself.

As to the first of these classes, it is necessary to recall the method of all judicial procedure, except the extraordinary processes, which at this time were comparatively rare. The ordinary course of procedure provided that the case should be remitted to a *judex*, who was almost invariably a private person. There was the necessity of professional advice. The legal profession here found abundant room for the employment of its talents. Again, the road to honor under the Empire was chiefly open to lawyers. The offices of state, which in republican times had given so much repute to their holders, no longer held the same attraction. They had been shorn of their glory; whereas positions created by the emperor in his council, and even semi-military positions, were held by lawyers. Papinian, Ulpian, and Paul were prætorian prefects during the reigns of Septimius Severus and Alexander. If such a position as this — the office superior to all others but that of the emperor himself — was open to lawyers because of distinction as jurists, the stimulus thus given to all members of the profession must have been very great. On the whole, the imperial patronage of the jurists was very discriminating. Those who attained eminence and rewards were those who were universally recognized as authorities in their profession. This was a much healthier stimulus to the legal class than was the struggle for honors and office during the time of the Republic. The objects sought were then attained by other merits than professional and scientific ability, of which the populace was a poor judge. The wiles of the politician and the craft of the demagogue were often successful, where the skill of the jurist was overwhelmingly defeated.

In immediate connection with the official honors conferred by the emperor was the professional honor of the *jus respondendi*, which was indeed an essential part of

the legal machinery. Through this, a man could always, by scientific work, obtain the highest honors in his profession.

The second class of influences included, among others, the Stoic philosophy and its effects upon Roman thought. This philosophy presented many attractions to the Roman thinkers. It was strenuous, and at the same time it inculcated endurance. It was a practical rule of life rather than a speculative system. Whatever transcendental elements it contained were subordinated to the clearly pronounced ethical tendency which ran through it. These were the recommendations which the Stoic philosophy bore when it made its appearance in Rome. Great numbers, with a desire to learn more of the secret of a happy and virtuous life, embraced the teachings of the Stoics. The popularity of the new philosophy was confined to no one rank or class. Seneca, the instructor of Nero, acknowledged this great system as true; Epictetus, the slave, was a follower of its teachings; Marcus Aurelius, the emperor, exhibited upon the throne the effects of the powerful influence exerted by this ethical philosophy.

It was, however, not in any one doctrine that Stoicism affected the jurisprudence of Rome, as much as in its general spirit and method. Its cardinal doctrine on the practical, and therefore more generally popular side, was to live according to nature. It taught that there was a nature to which everything should conform; there was a nature of man, a nature of the society in which man lived, and a nature of the world as a whole. That nature, or inner reason, according to which everything was created and in harmony with which everything attained its greatest happiness and true end, was something permanent, something eternal. From this was readily deduced the theory that the laws which govern human intercourse are also eternal. They were not mere generalizations of conduct; they were the rational laws of life, to which a



man must conform. These laws were regarded not as of the same nature as positive laws, but as the expression of a divine intelligence, and therefore eternally binding.

The first effect upon jurisprudence of this conception of the laws of nature, or the fundamental principles according to which human conduct should be shaped, was a radical alteration in the conception of the *jus gentium*. This became the *jus naturale*. It was not regarded as the mass of equitable legal provisions whereby men could transact business and vindicate rights; it was looked upon as the law of nature, which found expression in many customs of aliens and in many equitable provisions of the *jus gentium* which had been incorporated in both prætorian edicts. It was essentially a vast rational system, which lent itself to scientific investigation, and which deserved to be embodied in the conduct of society.

✓ By connecting the basis of jurisprudence with the eternal order of things through the conception of a *jus naturale*, a scientific foundation was given to the study of law. It was no longer an empirical study. It comprised more than a mere knowledge of the law of any one age. It was the investigation of the fundamental principles underlying the law of all ages. The lawyer investigated the meaning of the various terms with which he dealt. He sought to express by careful definitions the exact nature of the concepts which entered into the law. He traced the principles involved in the processes of law, and expressed them in terse maxims. All this he did with the conviction that in this logical analysis he was attaining to a real knowledge, not merely a convenient summary of human conventions. But the scientific study of law by analysis of the legal conceptions and processes could not stop with the results of that analysis. If in every generalization the jurist came nearer to the real nature of things, he could also reverse the process; he could apply the generalization to the practical cases which every day came to his notice.

By the study of its foundations law was stripped of adventitious matter and seen to be more comprehensive and more widely applicable.

A second result of the Stoic philosophy — although in this much was also due to other influences — was clear recognition of the connection between legal and ethical principles. The labors of the prætors to make *bona fides* prominent in all matters of the law had operated in the same direction. But the Stoics first evolved a practical working conception of law as ethical in principle. According to the new theory, law was not based merely upon the good faith necessary for dealings among men, as a sort of compromise instituted for the general convenience; it was based upon the eternal principles of right and wrong. But although ethics and law were thus brought into the closest relations, they were not confounded, and no attempt was made to enforce the moral law. The sanity of the Roman jurists was nowhere more clearly visible than in this. The law was not the whole embodiment of virtue. Of the four cardinal virtues of the Stoic philosophy — wisdom, justice, courage, and temperance — law was concerned with one only, justice. Hence Ulpian defined jurisprudence as the science of things just and unjust. At the same time, the higher duties of the lawyer were made clear, and the study of jurisprudence was pursued with lofty enthusiasm.

The great lawyers of the Empire, by whose labors jurisprudence became a science, had as the foundation of their work not only the statutes of the Republic, the laws promulgated by the legislative bodies, but the prætorian edict as well. The edict was made the basis of an interpretation which was in many respects similar to that which had made generally applicable the simple provisions of the Twelve Tables, and had rendered it possible for the generation of Cicero still to regard the Tables as the fountain-head of law. The prætorian edict, although it

had gone far to produce a law founded upon equity, was in need of an interpretation which would discover its meaning and purpose. That which had been done from a conviction of justice — often little more definite than the intuition of duty in some particular case — needed to be reduced to its component principles. The unexpressed must be raised to expression, and the unconscious brought to consciousness. Such a task was one little short of the creation of a new science of jurisprudence, for the erection of which structure the prætorian edict furnished the unhewn stone. The method followed by the jurists was strikingly different from that which is followed to-day. In spite of its innate strength and discipline, Roman jurisprudence “gave little thought to the abstract conceptions of the law, of ownership, or of liability, and what little it gave generally yielded but very scanty results. But with regard to the consequences involved in the abstract conception of ownership or liability, its natural instinct was never at fault for a single moment. And nowhere was this unique power more conspicuously displayed than in the way the Roman jurists, so to speak, hit upon the precise requirements of *bona fides* in human dealings, and applied them to individual cases.”<sup>1</sup>

The most important work of the jurists was that portion which dealt with the law of obligations. Here, by means of their insight and tact, they were able to divine the exact import of the transaction. Indeed they seem to have discovered the half-unconscious thoughts and purposes involved in many legal acts. Because of this, the law of Rome has survived, and has been incorporated into every system of modern law. In Germany and France codes have superseded its direct application. In England, statute law and common law, combined with a certain prejudice, have rendered its employment possible only indirectly. Yet, in all that concerns equity and the equitable inter-

<sup>1</sup> Sohm, *op. cit.*, p. 73.



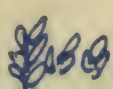
pretation of obligations, the jurisprudence of Rome has never been superseded, and it remains as a permanent possession of mankind.

### SECTION III.—GREAT ROMAN JURISTS

The great jurists of the Empire may be grouped into two periods: that of the earlier time, down to and including Gaius (*ob. post* 180 A.D.); and that of the later time, down to the close of the third century. In the earlier period, the influence of the two schools into which jurists were divided is distinctly visible. It was a period of steady advance in scientific acumen. The later period was that of matured power and greater brilliancy. It was also that which after a short time became the period of decline. Possibly the very brilliancy of the achievements of Papinian rendered the task of his successors more difficult, and made men more disposed to rely upon the results of past work than to seek fresh interpretations.

The two schools into which were divided the jurists of the early Empire took their rise in the teachings of two professors of law, Labeo and Capito. From the former arose the school of the Proculians, named after the most distinguished pupil of Labeo; from the latter, the school of the Sabinians, named after Sabinus, Capito's most famous scholar. The exact distinction between the two schools, as well as the connection between the doctrines and methods prevailing in the two and their originators, Labeo and Capito, are not always clear. The Sabinians were generally regarded as being the more radical in treatment of the law, and as being restive against its formalism. This was, indeed, the tendency of Sabinus himself. The Proculians, on the other hand, were conservatives, and strove to maintain the letter of the law.

The fortunes of the two schools had no connection with the respective merits of the two jurists to whom they trace their origin. Labeo was a lawyer of profound ability,



wide culture, and bold originality. It is to him that is to be traced the distinction between *actiones in rem* and *actiones in personam*. He was able to grasp the fundamental ideas of a large number of legal phenomena, reduce them to a common principle, and state that principle with admirable terseness. On this account his works exercised a profound influence and were the subject of exposition by much later writers. Capito was of less distinguished talents, though his career was remarkably brilliant. He had little to do with the founding of the Sabinian school, and his legal works were not adapted as a foundation of any school, being for the most part devoted to antiquarian research. But the Sabinians, who claimed their origin from him, were the successful party in the contest of the schools, finally triumphing over all competitors.<sup>1</sup>

It is not necessary to dwell upon each of the famous jurists through whose labors Roman jurisprudence attained its perfection. Those of the classical period—as it is called in jurisprudence—have been treated of in numerous and accessible handbooks;<sup>2</sup> yet some mention of them is necessary in a work on Historical Jurisprudence. The most important of those living in the first half of the second century were Celsus, prætor in 106–107; Salvius Julianus, prætor and twice consul; and Pomponius. Of these, Julianus was the most noted, because of his commentary on the prætor's edict. He and Celsus were among the legal advisers of Hadrian. In the Digest, Celsus is quoted 141 times and Julianus 456 times. Of Pomponius nothing is known except what can be gathered from quotations from him in the Digest. There are no

<sup>1</sup> Roby, in his *Introduction to the Study of Justinian's Digest*, Cambridge, 1884, chap. IX, gives an interesting list of the points in controversy between the two schools.

<sup>2</sup> Roby, *op. cit.*, gives an account of those jurists whose work entered into the Digest; cf. chap. VII to XV, exclusive. Karlowa, *Römische Rechtsgeschichte*, Leipzig, 1885, gives an ample account of these jurists in §§ 89–91. All the histories of Roman Law devote some space to them.

less than 578 of these; and Ulpian, in his extracts from Pomponius, gives more than 400 additional quotations. Celsus belonged to the school of Proculus; Julianus and Pomponius to that of Sabinus. The triumph of the Sabinian school was largely due to Julianus, although even after his time the differences between the schools still existed.

The latter half of the second century and the first years of the third comprised the most brilliant period of Roman jurisprudence. It was the era of Scævola, Papinian, and Gaius. Scævola was chief legal adviser to M. Antonius, and among his pupils were the Emperor Septimius Severus, and Papinian, the most famous of Roman lawyers. Of the life of Scævola nothing more is known. His contributions to the Digest are very important, and number 306 extracts, many of them of considerable length. He may be regarded as one of the triad, which included Julianus and Papinian, of the greatest and most original jurists of Rome.

Gaius has occupied an important position in legal history on account of his excellent handbook, or Institutes, of Roman Law, which furnished the model and a very large part of the matter for Justinian's more famous Institutes. He did not stand on a level with those great jurists who have been mentioned, and his writings are not quoted by any contemporary. But he was an admirable expositor, though he possessed little originality. The usefulness of his Institutes brought about the incorporation of that work — though in a greatly mutilated condition — in the *Lex Romana Visigothorum*. The discovery of the original work of Gaius in a palimpsest at Verona has led to a great increase in our knowledge of Roman legal institutions, for which he is often our only authority. Gaius is compared by Roby (*l. c.*) to Blackstone. He wrote *ad populum*, aiming at elegance, simplicity, and intelligibility, and assuredly found the true mean between pedantic precision and loose generality of statement. He con-



tributed 515 passages to the Digest. Nothing is known of his life.

Æmilius Papinianus was an Oriental, a native of Syria. His studies were chiefly pursued at Rome under Scævola. It is possible that he was connected with Severus by marriage. Whether or not this was so, his friendship with Severus was instrumental in securing him rapid promotion, until he became prætorian prefect in 204. This office combined military authority with the highest criminal and civil jurisdiction.<sup>1</sup> He was dismissed from office by Caracalla because of his opposition to the murder of Geta, the brother and colleague of that emperor, and in 212 was himself murdered by order of the emperor.

The court of law over which Papinian presided was probably the ablest that ever sat, for among his colleagues were Ulpian and Paul. Yet Papinian was *facile princeps* of this great triad. Extraordinary titles were given him by the ancients: *juris asylum et doctrine, legalis thesaurum, consultissimus, disertissimus, splendissimus, acutissimus*, etc., etc. The opinions of moderns, though expressed in less extravagant terms, are hardly less flattering. Cujas says of him that he was "the greatest lawyer that ever has been or ever will be; he occupies the same single præminence among jurisconsults that Homer does among poets." He was as great morally as professionally. Mommsen says of him that he was beyond doubt the first of Roman jurists in juristic genius and keen sense of right and morality, but at the same time the least Roman in his thoughts and language. "He has no equal in the precision with which he states a case, eliminating all irrelevancies of fact, yet finding relevancies of humanity that would have escaped the vision of most; and without parade, and as it were by instinct, applying the rule of law as if it lay on the surface and was patent to the world. No man was ever more worthy of the privilege of respond-

<sup>1</sup> Cf. Mommsen, *Römisches Staatsrecht*, II, 828, 932, 1058.

ing *ex auctoritate principis*; and no man ever displayed a higher sense at once of the power it conferred and the responsibility it imposed."<sup>1</sup>

The successors of Papinian were Ulpian and Paul. The former was the pupil of Papinian, the latter probably the pupil of Scævola. Their labors for the most part consisted in the task of gathering together all which Roman jurisprudence had then accomplished, and in interpreting Papinian and the other masters. The legal genius of Rome had found its consummate expression, and the writers who succeeded Papinian belonged to a less original, but hardly less useful, class of workers. Ulpian, like Papinian and Scævola, was an Oriental, and was employed by the emperor in posts of honor, among them that of prætorian prefect. His voluminous works form the basis of the Digest of Justinian, making about one-third of the whole, or 2464 extracts in all. Of these, more than one-half belong to his commentary on the prætorian edict. Paul was likewise prætorian prefect. His writings are second only to those of Ulpian in the amount contributed to the work of Justinian. Modestine is the only important jurist after Paul; the failing of scientific power is already manifest. Modestine contributed 344 extracts to the Digest.

#### SECTION IV. — CHARACTERISTICS OF IMPERIAL JURISPRUDENCE

The jurisprudence of the Empire is distinguished from that of the Republic by greater scientific accuracy and richer development. It is not as prolific in new principles and conceptions as the less conscious jurisprudence of the later republican era. As characteristic of the new period may be mentioned the loosening of family ties. This was done in two ways: with reference to the position of the wife in the family, and in reference to that of the son in the *patria potestas*. There existed a deep-seated repug-

<sup>1</sup> Muirhead, *op. cit.*, p. 324.

nance to the *manus*, and it was carefully avoided by patrician women, until it was decreed that even *con-farreatio* produced *manus* only so far as to make children born of that union eligible to the higher pontifical offices. The woman did not come under *manus* in the old sense. She did not become a member of the family of her husband.

The position of the son was altered in the direction of greater freedom in the acquirement and retention of property. He had a right to all obtained by him through military service; it did not fall to the *pater familias*. The son was also given a new freedom in the management of property acquired by himself or advanced to him by his father.

The law of obligation was examined with great care, and many refinements were introduced, although there was no decided revolution, and in fact but little more than scientific treatment of that which had previously obtained. Yet it was precisely this scientific treatment that made Roman Law what it was, especially in this, its most important division.

In the case of succession, a notable change was made by the *fidei commissum*. The position of the heir was greatly altered by the creation of testamentary trusts, especially when he was a peregrine; for in that case, according to current law—at least, before the extension of citizenship—he could not legally be an heir. The *fidei commissum*, or trust, devised to overcome this anomaly, was an informal bequest, which operated when the deceased—not by a civil form of transfer, but in form of a request—had bound another to make over to a third party the property conveyed. This transaction needed no will. It did not have to be drawn up in writing, or effected before witnesses. No formalities were necessary, beyond the practical necessity of proving that such a transaction had taken place. A letter was sufficient proof, or it might be established by parol. Such a trust, though surprisingly



informal in its constitution, could be enforced. And as it could be created for any person, there was in this custom the germ of an entirely different order of succession from that enjoined by the law.

Another change in the law of succession was brought about by the *senatusconsultum* of 178 A.D., whereby a mother and child were made to stand in immediate line of succession to one another. This operated in all cases, even where the marriage was without *manus* or the children were born out of wedlock. This enactment was merely a part of the general tendency in the direction of greater humanity shown by the leading jurists. A striking instance of this was shown in the decision of Papinian, whereby he made the law recognize human affection as an interest, while it refused to recognize vengeance as such.

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## CHAPTER X

### THE LAW OF THE CHRISTIAN EMPIRE

#### SECTION I.—RESULTS OF THE CONSTITUTIONAL CHANGES

WITH the advent of Diocletian to supreme power, the Roman Empire, which had been long declining, appeared for a time to receive new strength and vigor. An able ruler and brilliant military leader was once more at the head of the government. He was able to see the real dangers to which the Empire was exposed, and was sufficiently free from the influence of the Roman tradition to adjust the plan of government to the needs of the Empire by the establishment of military headquarters at the strategic centres. The growing Empire of Persia was an ever increasing menace to the Roman provinces of the extreme East. At no other part of the widely extended boundaries of the Empire was there equal danger. Diocletian therefore established his seat of government in the East. To care for the interests of the West, a colleague was chosen. Each emperor associated with himself another, in order that the Empire might be protected in every quarter. But, admirable as such an arrangement might appear at first glance, the imperial system could not endure with such an artificial constitution. The division between the East and the West, at no time obliterated, became newly accentuated, and the division of the Roman Empire into an Eastern and a Western empire periodically occurred until the two halves became permanently separated.

Even more important, as affecting the jurisprudence of the Empire, was the Oriental character given to the imperial dignity by the system of Diocletian. The

emperor was surrounded by a numerous body of officials, who derived their dignity, in large part, from the personal service they rendered their imperial master, and who rendered access to his presence ever more and more difficult. The emperor retired further and further from the popular gaze, and the authority with which he administered public affairs was based upon an inherent and semi-divine power. The old forms with which the imperial laws had been enacted were put away. There was no longer pretence of consulting the Senate and obtaining their formal coöperation in the passage of the law. The decree of the emperor became absolute. The system was henceforward a naked despotism.

The introduction of the imperial absolutism, and the post-Diocletian system of imperial government, worked important changes in the form of the imperial laws. The emperor had always enjoyed the right of proposing a law to the Senate in the form of an *oratio*. So great was the authority of the *oratio* that it was of little consequence whether the *senatusconsultum* or the *oratio* was quoted. From this to the recognition of the bare edict of the emperor was but a step. The law was then promulgated directly to the Empire in the form of an *edictum*, or *lex generalis*. The imperial authority had been extended by the necessity of supplying the deficiency occasioned by the decline of scientific jurisprudence. The emperor reserved to himself the right of interpreting and expounding the law. These *rescripta* were a prolific source of future law, and, together with the *edicta*, formed the bulk of the additions made to the law in the final revision. The *rescripta*, however, were not general laws, unless expressly so stated in their terms.

In spite of the division of the Empire, the idea of its unity was maintained. The laws which applied to one portion were supposed to be binding upon the other as well. But the absolute government of independent



sovereigns, and the consequent unrestrained power of promulgating laws, must have constantly led to difficulty in this respect. The laws enacted by one division were necessarily often unknown for a long time to the government of the other. Conflicts and contradictions were liable to occur at any moment. The difficulty inherent in the situation was further increased by the number of rescripts which were constantly put forth in the course of legal administration, and which, in the inferior state of the law, were often uncertain in meaning or contradictory. The difficulty was finally overcome by the limitation of a decision to the particular case to which it referred. From the time of Valentinian III and Theodosius II, the laws of one part of the Empire did not acquire validity in the other part, unless the law promulgated was formally made known to the second part, and was there published by special imperial edict.

The absolutism which introduced an immediate personal government, and above all aimed at a concentration of all power in the hands of the emperor, could but be felt throughout the judicial system, the part of the government in which it came into immediate contact with the common affairs of life. On the one hand was the increasing tendency toward centralization, on the other the decay of patriotism and the consequent disinclination to assume civil responsibilities. The old division of legal process into that before the magistrate (*in jure*) and that before the *judex*, or arbitrator appointed to try the case, (*in judicio*), was possible only as long as there were men ready to undertake the difficult and often burdensome task of serving as *judex*. This distinction had survived the decline of the *legis actiones* and the supplanting of these by the formulary system. But when it became the policy of the government to encourage everything that might increase the authority of the official: when it became difficult to find men willing to undertake irksome tasks for the

sake of the public good: there became necessary a system in which the magistrate or his subordinate could decide the case without reference to the private citizen as arbitrator. In the earlier law, indeed, it had been possible for the magistrate to so decide; but this was an extraordinary procedure. In the period which we are considering, this became the ordinary method, and was required in all cases, except the most trivial; in these latter a private citizen was not appointed to decide, but the case was tried before a *judex pedaneus*, who was an official of the local court. The *formula*, which had been an essential part of the old method, was entirely abolished, even in the subordinate form of reference which was retained. The result of this change of procedure "was not only the formal disappearance of the distinction between proceedings *in jure* and *in judicio*, but in the practical disappearance also of the distinction between *actiones in jus* and *in factum* and *actiones directæ* and *utiles*; the conversion of the interdict into an *actio ex interdictio*; the admission of power of amendment of pleadings; condemnation in the specific thing claimed, if in existence, instead of in its pecuniary equivalent; and execution accordingly by aid of the officers of the law."<sup>1</sup>

## SECTION II. — DECLINE OF SCIENTIFIC JURISPRUDENCE

The period which began with Diocletian was one of rapid decline in jurisprudence. At the beginning of this period the older traditions were still in force. There was still much legal activity, and the thousand and more rescripts of this reign stand witness to the intensity of juridical investigation. But the effect of the new imperial constitution was felt in the reign of Constantine. Hitherto the imperial legislation had been directed by the science of the great jurists. The law, as developed by the thought of the great lawyers of Rome, had been a free and healthy growth. Now the law was controlled by imperial legisla-

<sup>1</sup> Muirhead, *op. cit.*, p. 388.

tion. The might of imperial despotism was felt in every detail of administration. The imperial desire to put an end to the *perpetuæ prudentum contentiones* as to the opinions of Papinian prohibited the use of the commentaries of Ulpian and Paul upon that writer. However greatly jurisprudence had declined, there was still enough life in the science to enable it to discuss matters suggested by these commentaries or *notæ*. To prohibit this was simply to crush out whatever life remained. Henceforward the law was not to grow by free discussion, but by imperial enactment. A few years later, in 327 A.D., special authority was given to the works of Paul, and they were declared authoritative. This indicated the direction which the study of the law was to take. Independent production ceased. The products of the earlier period, in which alone was taken an active scientific interest, were slavishly adhered to. The prohibition of the discussion of the more difficult passages of Papinian, a discussion which had been stimulated by the commentaries, gave place to blind faith in authority, especially in such as gave the leading principles of the law in clear, dogmatic statements. The Institutes of Gaius and the *Sententiæ* of Paul were the works most frequently in the hands of the lawyer.

The decay of the science is most clearly shown by the law of Valentinian III, of the year 426, as to citations from the accredited lawyers. The following is the law as rendered by Muirhead:<sup>1</sup>

“We accord our approval to all the writings of Papinian, Paul, Gaius, Ulpian and Modestine, conceding to Gaius the same authority that is enjoyed by Paul, Ulpian, and the rest, and sanctioning the citation of all his works. We ratify also the jurisprudence (*scientiam*) of those earlier writers whose treatises and statements of the law any of the aforesaid five have made use of in their own works, — Scævola, for example, and Sabinus, and Julian, and

<sup>1</sup> *Op. cit.*, p. 390.



Marcellus,—and all others whom they have been in the habit of quoting as authorities (*omniumque quos illi celebrarunt*); provided always, as their antiquity makes them uncertain, that the texts of those earlier jurists are verified by collation of manuscripts. If divergent *dicta* be adduced, that party shall prevail who has the greatest number of authorities on his side; if the number on each side be the same, that one shall prevail which has the support of Papinian; but whilst he, most excellent of them all, is to be preferred to any other single authority, he must yield to any two. (Paul's and Ulpian's notes on his writings, however, as already enacted, are to be disregarded.) Where opinions are equal, and none entitled to preference, we leave it to the discretion of the judge which he shall adopt."

As has been pointed out, the mere enumeration of opinions, and a simple arithmetical process, were henceforward to take the place of juridical reasoning. That which was gained in attaining a definite judgment in a majority of cases was counterbalanced by the loss to the science of law. No doubt substantial justice was generally rendered; but there was no opportunity to keep the law abreast of the times. Such slavish reliance upon authority was possible only in an empire in which the recuperative forces were unequal to the task laid upon them and the powers of decay were steadily gaining ground.

There were, however, other forces active in the modification of the law in this period. These were, in particular, the influence of Stoicism and of Christianity. Of these, the former was the first to bring its influence to bear. The Stoic idea of a universal law, which from its nature was binding upon all men, had led to the overthrow of the ancient civil law. Under Caracalla the distinction between Roman and non-Roman ceased. Henceforth all who were free were Roman citizens. But thereby not the *jus civile*, but the *jus gentium*, was the gainer. With the

extension of the rights of Roman citizenship, the local privileges — which were inapplicable in the entirely different social conditions of different provinces — became meaningless. The importance of Rome and even Italy as the centre and origin of authority passed away. The provinces became the most important parts of the Empire, not merely in industrial and commercial aspects, but in political power as well. The new law was the world-law, the law of all men. A *jus Romanum*, or *leges Romanæ*, which should be applicable to the whole Roman world, became the prevalent conception of the law. It was this universal law which maintained itself after the Western Empire had fallen, and was able to embody itself in the new code drawn up by the barbarian conquerors. It was this idea which made the Roman law the law of the revived Roman Empire of the Germans, a law superior to those of all the various nationalities which made up that Empire.

### SECTION III. — INFLUENCE OF CHRISTIANITY

The influence of the Christian religion upon the development of Roman law belongs to the period subsequent to the reign of Diocletian. In the days of persecution, when the new faith was professed by but a few, and those few not political leaders, it was not to be expected that the precepts of the Gospel should affect the law of Rome. Following the commands of the Apostle, the Christians held aloof from the civil tribunals. Their differences were generally settled by the ecclesiastical authorities, and the parties to litigation felt in conscience bound to accept the decision of the bishop. The brilliant talents of such men as Origen and Cyprian — the former a theologian of the first rank, the latter an administrator unequalled in his time — suffice to prove that the absence of Christians from the ranks of the lawyers was not due to lack of intellectual ability.

The conversion of Constantine, and the subsequent change in the relations between the imperial government and the Church, had far greater effect upon the Church than upon the Empire. The vast mass which composed the latter had acquired a momentum which enabled it to persist in its course, in spite of many obstacles. The Roman Law had been made a part of the life of both heathens and Christians. Although the ancient faith had partly lost its hold upon the minds and consciences of men, it had not as yet lost its power to mould the customs and influence the lives of the populace. Even after Christianity had been professed by the immense majority, and the worship of the ancient divinities had been proscribed by law, the influence of heathen modes of thought and heathen practices was to be traced in institutions which had become a part of the ecclesiastical order. In the earlier days of the union between the Church and the Empire, any marked influence exerted by the former upon the law, the fundamental institution of the vast imperial structure, was out of the question. The new faith, however, was not only protected and endowed; it was given every advantage. So, while at the time of the union the Christians comprised but a relatively small portion of the population, in the course of a few decades they were in the majority. The property of the churches was restored and secured; the observances of the sacred seasons were protected by imperial law. The internal administration of the Church was regulated, and by the institution of general councils an attempt was made to create a universal Church government which in ecclesiastical affairs would duplicate the secular government of the Empire. But the legal system was but little affected by all this, however greatly the ecclesiastical system was disturbed. ✓

The small effect upon the law of the Empire which was produced by the conversion of Constantine was doubtless due in part to the temporizing policy of that ruler. If he



was won to the new faith from religious conviction — which seems to be extremely doubtful — he nevertheless retained those offices of the heathen religion which had previously been associated with the imperial dignity. The first Christian emperor was still *pontifex maximus*. He dedicated Rome to Fortune as well as to the God of the Martyrs. Though he professed the Christian religion, he was not baptized until on his death-bed.

The extension of the State's protection to the Church made a profound change in the internal ecclesiastical organization. The hierarchical system, which had slowly spread throughout the known world, suddenly became a vast political machine, the motive power of which was the needs of the Empire quite as much as it was the demands of religion. The Church consisted of a body of men more closely united than was ever any secret society, and its influence was more widely spread than was ever that of any similar institution. An alliance with such a body was a master-stroke of policy. But to utilize the possibilities of that society, it must be brought under a carefully organized system of government. The polity which had been common to all the Churches formed the basis of this system. The Church's government was closely modelled upon that of the Empire, and the system became rigid and its operation mechanical. The Church, with its multitude of interests, its variety of sentiments, its energy, and its enthusiasm, was converted into the established religion of the Empire, and thus succumbed to the power of the Roman Law.

With the passage of time, the personal religion of the emperor and the court could but exercise some effect upon the institutions of the Empire. The laws were the expressed will of the ruler. They bore the impress of his own wishes and plans. The high ecclesiastics, on account of their official positions and great abilities, were attendants upon the emperor in his court. They held positions

of importance. Their counsel was asked and acted upon. They exerted some influence upon the new legislation. But how much? Were the changes which were introduced in that period of the Empire beginning with Constantine the result of Christian influences, or can they be traced to other influences? It is necessary to note the nature of those changes. In addition to a general mitigation of many of the more cruel features of Roman life, which was in some degree attributable to the influence of Christianity, there were changes made in three sections of the law which were of marked importance. These were the further decline of the *patria potestas*, the alteration in the position of women, and the change in the order of intestate succession.

The *patria potestas* was further stripped of its ancient importance. The father no longer had the right to put his son to death. He could not, except when his son was very young, sell him as a slave. The son's right to his *peculium*, or own property, over which the father had no control, was extended. In general, the ancient idea of the family as under the patriarchal authority of the oldest living ascendant was displaced by the conception of the family as based upon mutual affection.

The wife did not, as of old, pass into the *manus* of her husband. Neither did she enjoy the liberty which had been hers in the early Empire. She enjoyed the possession of her own estate. Her union with her husband was regarded as a religious status rather than as a mere contract which might be set aside. Much of this, however, was not a matter of law, but rather of that slowly forming public opinion, moulded by the teaching of the Church, which was one day to profoundly influence the law. The divorce legislation which preceded Justinian was miserably inadequate. The heathen laxity was continued, and the only check upon the consequent demoralization of society was the constant influence of the Church. But the independence of the wife had been recognized long

since. The idea of marriage with *manus* had been practically abandoned centuries before. Even the marriage by *confarreatio*, the solemn religious marriage of the patricians, birth in which was necessary to the occupancy of any of the higher offices, conveyed after a time a very limited *manus*, — merely enough to render children so born eligible to office.

The ultimate result of the breaking down of the idea of the marriage as creating a *manus* was the modification of the laws of intestate succession. Property no longer descended preferredly in the male line. By a law of Valentinian the Younger, the children of daughters inherited alike with the children of sons. The ties of blood, and not merely those of law, were made the basis of the family union. No distinctions were made between male and female lines. Descendants generally inherited; in default of descendants, then ascendants, next coming the collaterals.

These and similar modifications in the laws were by no means wholly due to the influence of Christianity. Although the softening of manners and the increased respect for purity were largely due to the influence of the Church, there existed at the same time another powerful influence, that of the Stoic philosophy. This laid stress upon the importance of the individual as such. He was no longer of moral and religious value merely as a member of a family; it was his duty to cultivate his ethical nature, to attain the ideal which was held before him by his philosophy. Such a system of thought, magnifying the worth, importance, and value of the individual life, was embraced by the most earnest and energetic men. It numbered many adherents among the upper classes. An emperor — Marcus Aurelius — has left a work based upon its teachings. The effects upon law which would naturally follow from this philosophy were precisely those which are popularly ascribed to the influence of the Christian Church. As a



matter of fact, the important modifications of the law, due to the fuller recognition of the individual as a moral personality with peculiar rights, were mostly earlier than the recognition of Christianity by the State; though the Christian Church can claim the honor of perfecting that which Stoicism inaugurated and carried a long way toward realization.

#### SECTION IV. — BEGINNINGS OF CODIFICATION

The most important work connected with the history of Roman Law during this period was codification, whereby the rich developments of the preceding centuries were brought together and made accessible to every student of the law. It had been the custom among the jurists of earlier times to array the most important rescripts and other imperial laws in connection with their juridical discussions. They embodied them in their text-books, and thereby brought them into general notice in connection with the fundamental principles of the law, which remained much the same for centuries. The decline of independent juristic writing brought this practice to an end. If any jurisprudence at all was to exist, it was necessary to arrange in some order the vast mass of imperial decrees, ever increasing in number; some of general applicability, some modifying the law in one or more important particulars, and most expressed in the bombastic, tautological, and over-florid style which was increasingly prevalent. This was partially accomplished in two collections, the precursors of the great Justinian Code; these were the codices of Gregorianus and Hermogenianus.

Of these two jurists nothing is known except from their works, or rather the fragments of these which have been preserved.<sup>1</sup> The order in which the names of these codes

<sup>1</sup> The best edition is that of Hänel, *Corpus Juris Romani Antejustiniani*, Bonn, 1837.

are always mentioned, and the fact that in citations from the former the book and title are both given, while in those from the latter only the title is mentioned, have suggested that the code of Gregorianus was the older and principal collection, that of Hermogenianus being a sort of supplement.<sup>1</sup> This theory is borne out by the contents ✓ of the codes. The Codex Gregorianus contained constitutions from Septimius Severus to 295 A.D. It seems probable that the collection was made at some time during the reign of Diocletian, probably not long after the date of the last imperial constitution contained in the code. This theory seems to be corroborated by further internal evidence. The date of the Codex Hermogenianus is considerably later. As it contains seven rescripts of Valens and Valentinian of the year 365, it evidently could not have been compiled earlier than that date, unless, indeed, it appeared in more than one edition.

Although these collections were made without official authority and entirely by private enterprise, they were at once very generally received and used. They even seem to have become for later times the only important sources of the law as embodied in the imperial rescripts. Their influence on later jurisprudence is conclusively shown by the fact that the contemplated code of Theodosius II was ordered to be prepared *ad similitudinem Gregoriani atque Hermogeniani Codicis*, as well as by the fact that in the barbarian codes of the West some of the contents of these codices were reproduced. They were employed in the schools as text-books, and lectures were delivered upon them by the most distinguished jurists of the time.

Nothing is known as to the place of origin of these codes. The argument adduced in favor of an Eastern origin is that the bulk of the materials is made up of rescripts of the Eastern emperors, especially Diocletian; but this is met by the fact that copies of the laws of Diocletian were

<sup>1</sup> Cf. Karlowa, *Römische Rechtsgeschichte*, I, p. 941.

deposited in the West and access might be had to them in one part of the Empire as well as the other. The method of compilation followed by Gregorianus seems to have been, for the most part, the same as that subsequently followed in the Justinian Code; but the various documents were reproduced with greater fulness, and in greater numbers, than in the latter.

#### SECTION V. — THE THEODOSIAN CODE

No series of codes could possibly keep pace with the number of imperial edicts and rescripts which appeared. The students of jurisprudence found themselves unable to master the enormous bulk of the law. It was this deplorable condition which in 429 moved Theodosius II to establish a commission to remedy the prevailing confusion and uncertainty in legal matters. According to the edict with which he instituted his great work, the *leges generales*, which had been made by Constantine and his successors, down to and including Theodosius himself, were to be brought together and arranged according to subject-matter; but because it was unfortunately the fact that there were contradictions in the various constitutions, these were to be dated and arranged chronologically, so that the relative binding force of each might be readily perceived. This collection was intended to be of value chiefly to students, the *diligentiores*, and was to be used in connection with the earlier collections of Gregorianus and Hermogenianus. For practical use, another collection was to be made, which should comprise only the law in actual force. This last was to be undertaken after the collection of "Statutes at Large," so to call them, had been prepared and received the imperial approval. As the ampler collection was to show the *diversitas* of the *generales constitutiones*—for it included everything—the second was to exclude all *diversitas*. It was to be a compact, consistent code of law, needing little explanation, and immediately applicable.



Nothing came of this commission. Six years later a new one was appointed, but its work was planned on a less comprehensive scale. All the *leges generales* made since the time of Constantine the Great were to be brought together. They were to be arranged in a number of titles according to subject-matter. If any constitution properly fell under more than one title, or contained divers subjects, it was to be divided and the parts arranged in their logical places. Furthermore, redundant phrases were to be omitted from the constitutions, anything lacking was to be added to them, ambiguities explained and amended, and what was inapt to be corrected or improved. The new commission appointed for this work was made up of sixteen high officials, and the work itself was completed in 438 A.D. Copies with the imperial signature and authentication were sent to the Prefect of the East and the Prefect of Italy. In the West, the code was received by the Roman Senate and accepted by Valentinian III, Emperor of the West, as the law of that part of the Roman Empire. In the East, it came into force by an ordinance of Theodosius, January 1, 439. It was to serve as the final authority in all matters to which the imperial laws applied. The ancient *jus*, or the law of the jurists, which might be called the Common Law of Rome, was left untouched, except that its employment was to some degree regulated by the edict of Valentinian III, promulgated in 426 and called the *Lex de Responsis Prudentum*, which was also received in the East. It was the intention of Theodosius to cause to be prepared a second code, which should be composed of those parts of the great legal writers which had recently received the imperial approval, and should contain the *jus*, as the published code had contained the *leges*. This, however, was not accomplished, nor was it provided for in the organization of the commission which brought the first code to completion. The work was later attempted in an unofficial form.

The importance of the Theodosian Code does not depend

upon scientific arrangement, or on the learning and thought employed in compilation. In these respects it is inferior to its great successor, the Code of Justinian. Its arrangement is by no means all that could be desired, and the peculiar arrangement of the imperial constitutions was fatal to scientific precision and clearness. Its importance lay in the fact that, in spite of the permanent division of the Empire and the downfall of the Western half, the law in the two divisions was by it maintained on one and the same basis. In the Orient, the Theodosian Code remained in force until the time of Justinian, whose work was an attempt to complete and perfect the work of his great predecessor. In the West, the Theodosian Code survived the downfall of the Empire and served as the basis of the Romano-Barbarian codes.

The Theodosian Code differs from that of Justinian in many respects of form. The former was divided into sixteen books, each of which was subdivided into a large number of titles. Each title comprised numerous constitutions, or those portions of constitutions which were considered appropriate. The first six books comprised in general the organization of the courts of law, the private law, and matters connected with civil suits. In this, as in the earlier attempts at codification, the order of the Prætorian Edict was followed. The remaining books, with the exception of two small sections, discussed public law in the widest sense of the word. Books VII and VIII contained the new laws of administration, the ranks of the various officers, and the organization of the various departments of state; Book IX, the criminal law; Books X and XI, the law of taxes and state revenues; Books XII to XV, the constitutions and administrative law of the cities, the regulations for the taxes imposed upon them, the law of corporations, their duties and privileges, and similar matters; Book XVI, the law of the Church.

The supplanting of the Theodosian Code by the Justinian

in the East and the barbarian in the West was disastrous to the preservation of that code in its original form. It had been put forth as the only authoritative collection of laws. All previous laws which were not contained in it were, by that omission, annulled. But the treatment which the Theodosian Code had thus meted out to the older codes and laws — and which is necessarily involved in the production of any code — was in turn received by ✓ itself at the hands of the Justinian and Western compilations. There remained little reason to make or preserve copies of the antiquated code. The story of the discovery of the work of Theodosius is one of the most interesting in literary history. A large number — no less than three hundred and eighty-six — of the constitutions had been embodied in the *Lex Romana Visigothorum*. These were discovered and published in 1528. In 1550 the last eight books, in their original form, were published from a Vatican manuscript. In 1566 Cujas published books VI to VIII. These fragments were collected by the learned jurist Godefroy (Gothofredus), and by him provided with an elaborate commentary. This great work, published in six volumes folio, appeared in 1665, and was republished by Ritter (Leipzig) in 1736. No additions were made to the knowledge of the original code until the present century, when the revival of the historical study of law led to new discoveries. The Orientalist Peyron discovered in a palimpsest at Turin a number of fragments, which he published in 1824. Other palimpsests were discovered at Turin and in the Vatican; and at about the same time, at Milan, fragments were found in manuscript in the Ambrosiana. The complete work — as far as was then known — was published by Gustav Hänel at Bonn in 1842. Since that time a few additions have been made, but they are unimportant. According to Hänel's estimate, there are still lacking no less than four hundred and fifty constitutions which belonged to the first five books.



## SECTION VI. — PRIVATE CODIFICATIONS

The private collections which had been made by Gregorianus and Hermogenianus, and the official code published by Theodosius, included nearly all the imperial constitutions. But although the principal activity among jurists consisted of compilation and the making of excerpts, the remaining portion of the law was not wholly neglected; and it is very probable that numerous abridgments and attempts at codification were made by private individuals. The three works which have survived testify to this species of activity. These works are known as the *Collatio Mosaicarum et Romanarum Legum*, the *Fragmenta Juris Romani Vaticana*, and the *Consultatio Veteris cuiusdam Jurisconsulti*.

The *Collatio* was probably written about 390 A.D., and its origin has generally been ascribed to the East. Its aim was to show, by comparison of the various laws of the Pentateuch with the opinions of the great legal writers of Rome, that the Roman Law was derived from the Mosaic. This was chiefly attempted in the law of crimes and delicts, in which there was a possibility of comparison. The author's ultimate purpose seems to have been not merely to show the origin of the Roman Law, but to justify that law to those of his contemporaries who might have scruples as to its employment. For this reason, very little attention is paid to the recent imperial constitutions, which, as emanating from Christian sovereigns, were not open to suspicion. The value of the work lies chiefly in the many references to Papinian, Ulpian, Paul, and Modestine.<sup>1</sup>

The *Fragmenta Vaticana* are also in part made up from

<sup>1</sup> This work has been published many times. The best editions are those by Fr. Blume, 1833, and by Huschke, *Jurisprudentiæ Antejustinianæ Quæ Supersunt*, Leipzig, 1867.

the imperial constitutions, and especially from the writings of the jurists, of whom Papinian, Ulpian, and Paul are almost exclusively used. The date of this work is very uncertain. Mommsen, in his edition, states his belief that it was written before the death of Constantine (337). But a later date is more probable, and it may be put at about 400 or 425. This was a time when the need of simplification of the law was very keenly felt, as was shown by the unexecuted project of Theodosius. The place of origin of this fragment was probably the West, as there are therein a large number of references to this division of the Empire. It must be remembered that, because of the very imperfect condition of the manuscript, opinions are widely divided as to the object, origin, and method of the work. The general opinion<sup>1</sup> is that it was not an official collection, and that it was not so much a digest of the law as a crude compilation of opinions, copied without any curtailment or modification. It was certainly a very extensive work.<sup>2</sup>

The *Consultatio* was probably the work of an author of the early part of the sixth century, or the end of the fifth, and is the last product of distinctively Roman jurisprudence in the West. It is thought to have originated in Gaul. Its method is in general to propose hypothetical cases which might frequently arise, and to decide them by reference to the older jurists and the imperial rescripts.<sup>3</sup>

The works which have just been noticed have attained no extended influence. They were the work of private writers, and merely indicate to us the state of jurisprudence at the time of their composition.

The development of Roman jurisprudence, subsequent to the compilation of the Theodosian code was along three

<sup>1</sup> Cf. Karlowa, *op. cit.*, p. 972.

<sup>2</sup> It has been published, among others, by Mommsen, Berlin, 1859; by Bonn, 1861; and, as previously stated, by Huschke.

<sup>3</sup> Published by Huschke in *op. cit.*

independent lines. First, there was a new code which does not seem to have been officially promulgated, but which enjoyed a longer period of enforcement than any other. This was the Syrian Code, in force in some of the Asiatic provinces of the Empire. Secondly, there was in the Eastern Empire the great work of Justinian and the subsequent Byzantine compilations; and thirdly, in the West, the Romano-Barbarian codes. All these lines of development had their beginnings in the Code of Theodosius.

The Syrian Code is so called because it was first made known to modern scholars in its Syrian translation. This was brought to the attention of students of historical jurisprudence by the Dutch Orientalist, J. T. N. Land, who in 1862 published a translation of a manuscript which he had four years previously discovered in the British Museum. A critical edition of the code has since been published.<sup>1</sup> This work is, however, a translation from a Greek original, which was in all probability composed in Syria in 466 or 467. The translation was very early made into Syriac, and appears to belong to the first quarter of the sixth century — earlier than the appearance of the Justinian Code.

This work was no addition to the science of jurisprudence. It has stood aside from the main course of development followed by that science. Yet to a large part of what was once the Eastern Empire the work, in spite of its very unscientific spirit and numerous imperfections, was of great importance. It was translated into Arabic, and of this translation there are no fewer than seven manuscripts in the Bodleian Library at Oxford; it was also translated into Armenian and Georgian, and of both of these translations manuscripts have been preserved.

<sup>1</sup> *Syrisch-Römisches Rechtsbuch aus dem 5ten. Jahrhundert. Mit Unterstützung der Akademie der Wissenschaften zu Berlin aus dem orientalischen Quellen herausgegeben, übersetzt und erläutert von Bruns und E. Sachau. Leipzig, 1880.*



The aim of the author of this work — probably a member of the priesthood — was exclusively practical. The work was intended as a handy compilation for the use of bishops in the exercise of their duties as arbitrators in the ecclesiastical system of courts; a system which had sprung up in heathen times and had been continued by the Christian emperors. This system of arbitration by the bishops was especially in use in Asia Minor and Syria, and the employment of the work in their courts is shown by the many references to ecclesiastical affairs, and particularly to those matters likely to fall to the bishop for decision — such as questions connected with marriage and the right of succession.

The method followed by the author is entirely different from that of Justinian. There is little or no system in the arrangement; the original form and order of the Roman Law seems almost to have been lost. There is no mention of the names of the jurists from whose works excerpts have been made, or of the emperors whose constitutions are copied. There has been added a not inconsiderable amount, wholly strange to the Roman Law, in the shape of local customs, which appear to have been incorporated from actual personal knowledge.

On account of the date at which the work appeared — fifty years before the Justinian Code — and also on account of the form in which it was written, it was so generally received that when the great imperial code was promulgated the private collection was able to retain the place which it had held for half a century. Its very defects rendered it popular. It was comparatively brief; it was far easier to master than were the enormous official collections of the law. The political and religious conditions of the Empire rendered the work more acceptable than the Justinian Code. The Monophysite and Nestorian heresies had created great schisms in the Church. The communities which embraced these doctrinal errors held

aloof from the Byzantine Court and assumed a more or less national character of their own; and their own law-book was duly prized. In different parts of the East the work retained its authority until very late. In the Transcaucasia it was in force as late as the seventeenth century.

## CHAPTER XI

### THE JUSTINIAN CODE

#### SECTION I. — THE LAW-BOOKS

THE century following the appearance of the Theodosian Code was fertile with changes in the law of Rome. A great number of imperial constitutions were issued. The collections which had been issued officially or had received official sanction rapidly became antiquated, and a new revision was needed. As ever, the distinction between *jus* and *leges* was maintained, but there was no authoritative reconciliation of the difficulties and contradictions occurring in them. The law of Valentinian III regarding citations, although it might be of avail in the larger places and where the libraries of the lawyers and courts were complete, was of little assistance in the general administration of justice. The decisions of the lower courts depended less upon the law than upon what particular authorities chanced to be at hand. It was urgently demanded by the condition of the law that there should be some authoritative statement of the many variations which had been introduced therein by the *leges novellæ*, or the laws promulgated since the completion of the Theodosian Code, and also of the effect of the laws included in that collection upon the *jus*, or law of the jurists. There was also much legislation which was still theoretically in force but was practically obsolete. Much of this might have been avoided had the larger plan of Theodosius been completed, and it is possible that in that case the final compilation might have been that known by his name.



But the delay resulted in the greater excellence of the code which finally appeared; for from the time of Theodosius II to that of Justinian legal science, which had been greatly stimulated by the work of the former, was active and progressive.

The Emperor Justinian, or Flavius Anicius Justinianus, surnamed the Great, was born on May 11, 483, at Tauresium in Dardania, a part of Illyricum. He was of barbarian origin—either Teutonic or Slavonic—and was originally known as Upranda. He came to the throne by succession to his uncle, Justin; but before he became associated with the latter in the imperial dignity he had served in many positions of importance. He was therefore thoroughly conversant with the condition of the law of his times, and his active association with his uncle in the government had increased his knowledge of the subject. He became sole emperor on April 1, 527, and hardly more than six months after his accession he projected the great compilations which are known by his name. He announced his intention of doing this in a constitution addressed to the Senate, February 13, 528.<sup>1</sup> His aims in publishing a new code, as stated by him, were to diminish the length of lawsuits, to do away with the confusion in the mass of constitutions contained in the Gregorian, Hermogenian, and Theodosian Codes, and those published by Theodosius and his successors, and to bring them all together in a single code under his own name. He then named the commissioners whom he had appointed for the work. They included John, ex-quæstor of the sacred palace, ex-consul, and patrician, who was to act as chairman; Tribonian, who afterward became the head of the commission; Theophilus, count of the Consistory and professor of law at Constantinople; and seven others.

The method according to which the commissioners were

<sup>1</sup> *Constitutio Hæc quæ necessario.* This forms the first preface to the Code.

to work was carefully prescribed. "We permit them, suppressing preambles, repetitions, and contradictory or disused clauses, to collect and classify the laws under proper titles, adding, cutting down, modifying, and compressing, if need be, several constitutions into a single enactment, so as to secure more clearness and yet preserve in each title the chronological order, so that their order may be noted by position in the Code as well as by the date."

The work was completed in a surprisingly short space of time. Within fourteen months it was finished, and the Emperor was able, in a constitution of April 7, 529, to announce to the prætorian prefect that the commission had completed its labors and reported the new code to him. The prefect was directed to announce that the code would come into effect on April 16, 529; and it was expressly forbidden all pleaders and advocates, under penalty of incurring guilt of fraud, to quote any constitutions not included, or to quote those included in other form than as there presented. The new constitutions, together with the works of the ancient interpreters of the law, must suffice for the decision of all suits. No difficulty was to be raised because some of them were without date, or because they had originally been only private rescripts. This last point was especially important, inasmuch as decisions in private cases—unless especial statement was made to the contrary—had for a long time been inapplicable to other similar cases. Each case had been decided upon its own merits. All these rescripts, as far as they were included in the Code, were now to be used. Privileges which had been granted to corporations and cities, though they were not in the Code, were allowed to stand, provided that they were not in conflict with the laws therein contained.

But Justinian was not content with the compilation of only the *leges*. He had probably planned from the first a more far-reaching reformation of the law. In the Code he

had merely followed the examples of his predecessors. A digest of the *jus*, or the writings of the jurists, was even more imperatively needed. This had been roughly accomplished by the barbarian monarchs of the West, and in both parts of the Empire it had been attempted by lawyers. The barbarian codes were undoubtedly among the influences that caused Justinian to undertake his digest. The energy, the system, and the rapidity with which the law-books of Justinian were produced are evidences that from the first a plan for the whole was carefully elaborated, and preparations made, although the emperor did not at once announce his whole intention.

Before the commission had finished the Code and begun their new task, a difficulty had arisen. Tribonian, who had assumed the leadership in the work, saw that there were many points in the law which needed authoritative decision from the Emperor himself. There were various contradictions, so fundamental that the commission was not competent to deal with them. From this necessity came a body of fifty decisions, successively enacted immediately after the completion of the Code. These *Quinquaginta Decisiones*, which Justinian in the Institutes<sup>1</sup> attributes to the suggestion of Tribonian,<sup>2</sup> were subsequently incorporated in a new edition of the Code, ratified November 16, 534. It is this edition which is now extant. All copies of the earlier code have disappeared, so that no comparison between the two editions is possible. But it is highly probable that the new edition was simply the original code, modified only by the insertion of the four hundred, or more, enactments issued by Justinian in the fifty decisions, and by the omission of those parts which were in conflict with those enactments.

The Code was divided into twelve books, and contained

<sup>1</sup> *Inst.*, I, 5, 3.

<sup>2</sup> They seem to have at first formed a small official collection by themselves, and are so referred to by Justinian in several constitutions.



between 4600 and 4700 enactments. Each of these enactments is given with the name of the emperor from whom it came, the person or corporation to whom it was addressed, and the place and time of issue, if known. Of the whole number of selections, about one-half were originally rescripts that up to this period had not enjoyed binding force. The earliest enactment included is one of Hadrian's rescripts. The imperial contributions to the Code were of varying extent. There were taken in excerpts from Verus and Marcus Aurelius, about 180; Commodus, about 190; Septimius Severus and Caracalla, about 190; Caracalla alone, about 250; Alexander Severus, about 450; Gordian III, about 270; Diocletian and Maximinian, more than 1200; Constantine, about 200; Valentinian II, Theodosius I, and Arcadius, about 200; Valentinian alone, about 170; Arcadius, about 180; Theodosius II, about 190; Justinian, about 400.<sup>1</sup>

The work of the Digest, which had been meanwhile undertaken and was rapidly progressing, was by far more difficult than that of the Code. It was nothing less than a reduction of the whole mass of authoritative treatises by the older lawyers into one consistent whole. It was essentially a digest of all the law not contained in the imperial constitutions; yet it was not to be merely a slavish compilation of the opinions of the classical writers, for much of the law was antiquated and set aside, and much was so changed as to be applicable only after thorough revision.

The new work was to be under the direction of Tribonian. In a constitution of December 15, 530,<sup>2</sup> addressed to Tribonian, that official was directed to undertake the work, and to select as assistants a large number of learned men, to be approved by the emperor. These men were to

<sup>1</sup> See Deurer's *Aussere Geschichte und Institutionen des Römischen Rechts*, Heidelberg, 1849.

<sup>2</sup> *Constitutio Deo auctore, De conceptione Digestorum.*

be selected from the professors of law at the schools, and from the advocates of the court of the prætorian prefect. The first duty of the commission was to collect, read, and digest the necessary material, to be taken from those jurists who had been approved by the law of Valentinian III as to citations. The whole was to be reduced to those passages which were clear and precise. The best written opinion was to suffice for all on the subject. Matter which had been embodied in the imperial constitutions included in the Code was to be omitted, unless it was found necessary that it should be stated more particularly and with greater precision than it was found in that work. All redundancies were to be omitted, and all contradictions carefully avoided. The same liberties in dealing with the material were allowed here as in the compilation of the Code. All not included in the Digest was to have no legal authority, and there was to be no distinction in importance between the various authors. All was to have the force that was to be derived from Justinian's enactment of the whole body of excerpts as the law of the Empire, and the law was to stand as therein written, without reference to original texts. The most important rule laid down was that concerning conflict of opinion. In this there was an immense advance upon the law of Valentinian III upon the same subject. There was to be no mere calculation of the number of authorities. The notes of Ulpian, Paul, and Marcian upon Papinian were to be regarded, and the contradictions were to be removed according to the judgment of the members of the commission. Furthermore, the omission of obsolete laws was to be according to the actual practice of the law courts of Constantinople. The whole was to be arranged in the order of either the *edictum perpetuum*, or of the code of constitutions which had just been issued. It was to be divided into fifty books, and subdivided into titles. The whole was to be known as *Digesta* or *Pandectæ*, and no

commentaries, but only *indices* and *paratitla* were permitted to be written upon it.

Three years after the appointment of the commission, Justinian gave an account of its work in the constitution *Tanta circa ad senatum et omnes populos de confirmatione Digestorum*.<sup>1</sup> He said that a very large number of books had been used, many of which had been unknown to the most learned but had been collected by the efforts of Tribonian. All these had been closely read. Excerpts had been taken from some, while others contained nothing which could be used. According to Tribonian, the amount read was two thousand *libri*, containing in all no less than three million lines. These had been reduced in selection to fifty *libri* and about one hundred and fifty thousand lines. Therein the gain had been very great, in that the whole body of law might be obtained for a moderate sum and studied in a much shorter time than could the great mass. The Emperor asserted that no contradictions were to be found in the Digest; such statements as seemed contradictory could be explained on careful investigation. Repetitions there might be, because of human liability to err. The work was to come into force after December 30, 529. From that date, the Justinian books were alone to be authoritative. The writing of commentaries was again forbidden, and any one so offending was to be punished as a forger, and his book was to be destroyed. In future copies of the Digest no abbreviations were to be made, and copies containing such blemishes were not to be used in court.

The Digest contained fifty books, which were grouped into seven parts. Part I was known as *prota* (πρώτα), and contained four books; Part II, known as *de iudiciis*, contained seven books; Part III, *de rebus*, eight books; Part IV, which was the most important of all, contained eight books, and treated of: (1) everything having reference

<sup>1</sup> The account was repeated in the Greek constitution Δέδωκεν.



to the *hypotheca*; (2) the *ædilicium edictum*, *redhibitoria actio*, and the *duplæ stipulatio de evictionibus*; (3) the law of interest; (4–6) *sponsalia*, *nuptiæ*, *dos*; (7–8) *tutelæ* and *curationes*. Part V, *de testamentis*, contained nine books; Part VI, eight books of varied contents; Part VII, six books, among which were two treating of the *delicta privata extraordinaria* and the *crimina publica*, another the law as to appeals against both criminal and civil decisions, and a final book containing, among other things, the titles *de verborum significatione* and *de regulis juris*.

An examination of the matter arranged under the various titles reveals the method which was employed in the compilation of the Digest. The whole number of works consulted was divided into three groups, and each group was read by a third of the commission. These groups were distinguished according to the work therein which was held as the most important. These were the commentaries on Sabinus, on the Edict, and on the works of Papinian. It is probable that each group of work was assigned to those most familiar with it, the Sabinian group to the professors of law, the others to the practising lawyers. In each group an extensive work was taken as foundation. Extracts were made from it and brought together as an outline, and the extracts from the smaller works were added. In the case of the writings bearing on the Edict, the commentary of Ulpian was used as the foundation. To this were added the commentaries of Paul and Gaius. After the completion of the process of extracting suitable passages, the three bodies of compilers compared notes, and the contradictions and repetitions were corrected or excised. This was the work of the Papinian body. As to the arrangement of the excerpts, the group furnishing the greatest number for any title was placed first. This was enlarged by additions from the other two groups, and what remained was appended. While the reading was in progress new works were brought to the commission, and

these, after the reading of the original set of works, were read by the Papinian body, and available selections were added to the other excerpts. The merit of discovering the method of the work belongs to Bluhme,<sup>1</sup> and his theory is generally accepted as correct.

In spite of all the care expended upon the work, it was inevitable that excerpts should be repeated or not placed under their proper titles, and that ~~contradictions~~ should appear. This resulted from the method of labor and the speed with which the work was completed. These repeated extracts (*leges geminatae*) and misplaced extracts (*leges fugitivae* or *erraticae*) are, however, comparatively rare. As to the contradictions, it was hardly to be expected that an immense work made up of extracts should be free from them. Probably the only method of avoiding them would have been to rewrite the whole subject-matter, making no attempt to retain the language of the classical jurists. This would have been a task of far greater difficulty, and would have required much more time.

The Digest was intended to be a work for students as well as for the administrators of the law of the Empire. But it was early apparent that when the work had been carried out as planned it would result in something far too voluminous and complicated to serve the former purpose. There was need for a work which would take the place of the well-known and long-used Institutes of Gaius. It was the intention of Justinian that the Code and Digest should respectively take the places of the whole body of imperial constitutions and enactments of every sort and of the whole body of juristic writings which were constantly quoted in the courts. In the constitution<sup>2</sup> providing for the Digest, the possibility of a substitute for the work of Gaius was thus alluded to in section 11: "Everything will be ruled by these two codes — the code of the constitutions

<sup>1</sup> *Zeitschrift für Geschichtliche Rechtswissenschaft*, iv, 256-472.

<sup>2</sup> *Deo auctore*, in C. 1, 17, 1.

and that to be drawn up of the revised laws ; and by a third also, if there should be promulgated by us another work in the shape of Institutes, in order that the learners having been grounded in the simpler matters might the more easily proceed to the knowledge of more abstruse learning."

No special constitution for the compilation of the Institutes was put forth. Justinian gave the work into the charge of Tribonian, who executed it with the aid of Theophilus, a teacher in the law-school at Constantinople, and Dorotheus, a teacher in the law-school at Berytus. Both of these men had been engaged in the preparation of the other Justinian law-books. Except from information gathered by critical examination of the text itself, there is no knowledge as to the division of the work. The most plausible theory is that put forth by Huschke in his edition of the *Institutes of Justinian*.<sup>1</sup> According to this theory, the whole plan was worked out by the three men together. Then the preparation of the books was intrusted to the two subordinates, Dorotheus taking the first and second books, and Theophilus the third and fourth books. The grounds for believing that the work was thus divided are chiefly stylistic. The first two books closely resemble each other, and are markedly different in style from the last two, which are evidently the work of one hand. Furthermore, references from one portion to another are in each case confined to the two books composing a group. The identification of the last two books as the work of Theophilus is based upon stylistic resemblances to a treatise known to have been written by him. The whole work, when completed, was finally revised by all three commissioners.

The new work was intended to take the place of Gaius ; but it was also, as has been said, to be a part of the law. According to Justinian, it was to contain *totius eruditionis prima fundamenta atque elementa*. But it was more than a

<sup>1</sup> In the *præfatio* of the edition of 1868, Leipzig, p. vii ff.



compendium of the simpler principles of the law. It was to a large extent historical, and as such was intended as an introduction to the study of the Code and Digest. It was to supply everything needed to render profitable the study of those more elaborate works. A different system of arrangement and division was used. The Institutes of Gaius had been divided into four books. The first treated of persons, the second and third of things, and the fourth of actions. In the Institutes of Justinian the same order was followed. Even the language of Gaius is often repeated in its successor. Still, the Justinian work is clearly an attempt to bring Gaius abreast of the condition of the law of the time, and is entitled to be regarded as an original work.<sup>1</sup>

The difference in order of arrangement between the Digest and the Institutes is fundamental. The Institutes attempt to arrange law according to a logical order, and to group it under its chief heads. Because of the importance of the Institutes as a foundation of legal studies, the arrangement thus adopted has become so well known during the last century and a half that the threefold division has been commonly regarded as a fundamental principle founded on the nature of law itself. The division has, however, of late been seriously attacked as being imperfect and inferior to a division founded upon different species of rights.<sup>2</sup> But whatever objection may be urged against the order followed in the Institutes, it is a long advance upon that found in the Code and Digest. This seems at first sight without any logical method. Yet on closer view, and on being compared with other compila-

<sup>1</sup> Useful translations of the Institutes of both authors may be found in David Nasmith's *Outline of Roman History from Romulus to Justinian (including translations of the Twelve Tables, the Institutes of Gaius, and the Institutes of Justinian)*, with special reference to the growth, development, and decay of Roman Jurisprudence, London, 1890.

<sup>2</sup> In this connection see H. L. Maine, *Early Law and Custom*, London, 1883, chap. XI, on the Classification of Legal Rules.

tions of Rome and other countries, a certain principle is discernible. This principle appears in the Twelve Tables and all of the older collections, and is that of the earliest conception of law. The first object of the law, as distinguished from a system of self-help, was to bring the defendant before a court, that therein he might be adjudged guilty or required to satisfy the plaintiff. The first point of any system was to provide for the inception of a suit at law. The next point was to deal with the various grounds of dispute. These matters were arranged without much logical connection, possibly because the conception on which the division was founded did not at once suggest any logical arrangement. But it should be noted that this general plan appears in the Twelve Tables, the Edict, the various earlier codes, and in the Justinian Code and Digest as well. In the two latter, the first book in each case is given up to matters which might be regarded as introductory; but in the second book the *actio* begins, and a close correspondence between the earliest and latest monuments of Roman Law may be traced through no less than nineteen books of the Digest. As Maine has pointed out,<sup>1</sup> the same general idea as to arrangement appears in the *Lex Salica* and the Hindu law-book. In all these, the law of actions precedes the rest of the law, for the reason that in primitive law the action was the most important feature. In the Institutes, the substantive law comes to the front, and the adjective law becomes less important. In the Institutes of Gaius, the proportion of the law of actions to the whole bulk is only one-fourth; in the Justinian compilation, one-sixth. In modern law it is still less. This same reduction in the amount and importance of adjective law is discernible in any system which has passed through a long course of development. It is especially noticeable in England, where the early law is substantially the law of actions. "So great is the

<sup>1</sup> Maine, *op. cit.*, p. 371.

ascendency of the Law of Actions in the infancy of Courts of Justice, that Substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of the technical forms."<sup>1</sup> As a matter of fact, the superior arrangement of the Institutes over that of the Digest or Code has been perceived only within a comparatively recent period. The early writers on Roman Law, including all the mediæval glossators, followed the order of the Digest. The demand for a logical system was first strongly felt in the eighteenth century.

The astonishing rapidity with which the Code, — in two editions, — the Digest, and the Institutes appeared was attained at the expense of accuracy, and there were necessarily other imperfections of many kinds. These the Emperor attempted to correct by a large number of new constitutions, which were promulgated immediately after the appearance of the Digest and Institutes. These new constitutions, officially known as *novellæ constitutiones post codicem*, number one hundred and fifty-two, of which number thirty relate to ecclesiastical matters, fifty-eight to the administration of justice and the criminal law, and sixty-four to the private law. These were intended for the East were written in Greek, and for the newly reconquered provinces of the West in Latin. In form they exhibit great similarity, and they are without the abridgments which mark the constitutions incorporated in the Code. No official collection was made of them, and comparatively few were issued after the death of Tribonian in 543. In 554, by order of Justinian, the Novels were published in Italy, and thus the whole body of the law came into effect in that country.

The Novels have been preserved in a number of private collections. Of these, possibly the earliest is the *Epitome Juliani*. This contains one hundred and twenty-two Nov-

<sup>1</sup> Maine, *op. cit.*, p. 389.



els. The first thirty-nine are without any order, the remainder are arranged chronologically. The collection was made at Constantinople during the reign of Justinian himself, and the author was probably a teacher of law. The work contained the new constitutions in a Latin translation, and was doubtless intended for the reconquered Italy and Africa. A second collection, also in Latin, is the so-called *Authenticum*, or *Versio Vulgata*. The history of this collection is obscure. It may be true that this is the collection originally published in Italy by Justinian himself. Such was the tradition as to its origin. But the internal evidence is very scanty. Zachariä von Lingenthal<sup>1</sup> places the composition in Italy, immediately after the publication of the edict making the Novels binding in the Exarchate. This collection contains one hundred and thirty-four Novels, dating up to May, 556; they are arranged with little regard to order. There is a third collection, in Greek, containing in all one hundred and fifty-two Novels, and sixteen other pieces, by Justinian and others. In this, the first one hundred and twenty Novels are arranged chronologically.

The Code, the Digest, the Institutes, and the Novels make up the *Corpus Juris*, or *Corpus Juris Civilis*, as distinguished from the *Corpus Juris Canonici*, and form the basis of the mediæval Civil Law, as it was studied as a science in the great law-schools of Bologna and elsewhere. The *Corpus Juris Civilis* is also the basis of the scientific law of all European countries, and is to-day the object of most assiduous study.

The method of citing it slightly varies in different countries. The German method is somewhat fuller than the English, and retains the title in an abbreviated form, as the older method of citing the Canon Law retained the

<sup>1</sup> *Zur Geschichte des Authenticum und der Epitome Novellarum des Antecessor Julianus*, in *Die Sitzungsberichte der Berliner Akademie*, 1882, 2, p. 995.

title. The Institutes are divided into book and title, and each title into paragraphs. The brief summary preceding the numbered paragraphs under each title is called the *principium*, and is abbreviated pr. A citation from the Institutes would read as follows: pr. I. *de mandato* (3, 27). In this abbreviation pr. = *principium*; I = *Institutionium*; *de mandato* is the title; and 3, 27 = the third book, twenty-seventh chapter. The usual English method of quotation omits the redundant title, and for the same citation would be Inst. III, 27. pr.

The Digest is divided into fifty books, each of which is subdivided into a varying number of titles. Each title is in turn made up of a varying number of excerpts, originally known as *leges*, in modern times as "fragments." Each fragment is again subdivided into a *principium* and numbered paragraphs. An example of the German method of citation from the Digest is: L. 3. § 1. D. *de acq. poss.* (41, 2). In this abbreviation D = *Digestorum*; *de acq. poss.* is an abbreviation for *De acquirenda, vel amittenda possessione*, which is the second title of the forty-first book; L = *Leges*, of which § 1 is quoted. Some authors treat *Fragmenta* as a name applicable only to the Digest, and would write the above thus: fr. 3. § 1 *de acq. poss.* (41, 2), omitting D. The thirtieth, thirty-first, and thirty-second books are devoted to one subject — *De legatis et fidei commissis* — and are not subdivided into titles. They are cited as follows: L 1. D. *de legat.* I (30). The usual English method of citing the Digest is brief, thus: Dig. [or D.] 41, 2, 3, 1. It is, however, not so immediately clear.

The Code is divided into twelve books, each of which is subdivided into a large number of titles. These again are divided into *leges*, and each *lex* into paragraphs. An example of the German method of citation from the Code is the following: L. 11, § 1. C. *depositi* (4, 34). In this abbreviation C = *Codicis*; the rest is evident. Occasionally C. (= *constitutio*) is used as indicating a *lex* of the Code; in

that case the above citation would read C. 11. § 1 *depositi* (4, 34). The English method of citing the above would be Cod. [or C.] 4, 34, 11, 1.

The Novels are uniformly quoted by number, chapter, and paragraph.

The manuscript authorities on which rests the text of the law-books of Justinian are comparatively few, taking into consideration the immense importance of the books to the Empire and the consequent multiplication of copies. Of the whole body of the law no complete manuscript of great critical value is known to exist. The editions which have been published have been made up from manuscripts of the constituent portions. The Institutes, on account of their elementary character, are preserved in more manuscripts than are other portions of the *Corpus*. The earliest complete copy of the Institutes is the *Codex Bambergensis*, of the ninth or tenth century, but there are many earlier fragments. The Digest is represented by only one complete and independent manuscript, the *Codex Florentinus*. Its date is the sixth or seventh century. It was originally owned by the city of Pisa, and was carried to Florence in 1406 as part of the booty brought back by the Florentines after their conquest of Pisa. Its origin is unknown. Legend ascribes its acquisition by the Pisans to their conquest of Amalfi. It was, however, probably acquired from Constantinople. It was certainly at Pisa in the middle of the thirteenth century, as a law of 1284 provided for the care of it. From this manuscript — which was very carefully written, having no abbreviations or gross copyist's errors — the other complete manuscripts, all of which belong to the Bologna school of law, have been copied. But these, at least in some cases, seem to have been corrected by a manuscript other than the Florentine. If this were really the case, no trace of the other manuscript remains. The best of the Bolognese manuscripts are those containing the first nine books. The Code also exists in



these incomplete early manuscripts, but they have been much injured by the insertion of passages taken from the Novels, and by the omission of the Greek constitutions. The Novels are known only through the *Authenticum* and Julian's Latin *Epotome*, and not until the sixteenth century were manuscript authorities of any value employed in making up editions.

The editions of the *Corpus Juris Civilis*, as the collection was first named in 1583 by Denys Godefroy, are very numerous. With the exception of the Bible, no book was ever more widely studied by the Caucasian races. The best critical edition is that of Mommsen, Krüger, and Schoel. In this edition, Krüger edited the Institutes and the Code, Mommsen the Digest, and Schoel the Novels. The text edition of Mommsen,<sup>1</sup> which has been on all sides accepted as the authoritative text of the Digest, is reproduced in this later edition. The Institutes have also been ably edited by Schrader (1832) and Huschke (1868), and the Novels by Zachariä von Lingenthal.<sup>2</sup> Of editions by English authors, and provided with English notes, it may suffice to mention that of T. C. Sanders, *Institutes of Justinian, with Introduction and Notes*, Fourth Edition, London, 1869; an American edition, with a very valuable introduction by Judge Wm. G. Hammond, published in Chicago in 1876; that of J. B. Moyle, *Imperatoris Justiniani Institutionum Libri Quattuor, with Introductions, Commentaries, Excursus, and Translation*, Clarendon Press, Oxford. T. E. Holland and C. L. Shadwell have published *Select Titles from the Digest*.

## SECTION II. — CHANGES IN THE OLD LAW

The characteristic features of the Justinian legislation may be grouped under three heads, namely, the law of the family, the law of property, and the law of succession.

*Sub-section A. Domestic Relations.* — I. The law of

<sup>1</sup> 2 vols., Berlin, 1866-70.

<sup>2</sup> 2 vols., Leipzig, 1882.

the family was changed by the practical abolition of the *patria potestas*, though Justinian in the Institutes boasts of that right as a distinguishing feature of the Roman law.<sup>1</sup> The father could neither kill nor expose his child. He could not sell him into slavery, except in case of extreme poverty, and then only when the child was an infant. He could not make a noxal surrender of his child in case of the child, by his delict, having caused loss to a third party. In other words, the child had a right to life and liberty, and could not be deprived of these by his parent. In the eyes of the law, the child had become a person, and the rights of the father were correspondingly curtailed. The child had property rights as well. His earnings and other acquisitions, which had previously been recognized as his property in case of receipts from military service, by a principle extended to many other earnings (*peculium castrense vel quasi*) were regarded as his own property, and on his death the father inherited as an ascendant only in case of the failure of descendants. This was an advance beyond the older law in respect to the *peculium castrense*, which latter gave the son merely temporary possession of his *peculium*, suspending during the lifetime of the son the rights of the real owner, the *pater familias*.

The practical abolition of the *patria potestas* was naturally and inevitably followed by a change in the marital relation. The wife no longer stood as a daughter under the authority of the head of the household. The last vestiges of *manus* disappeared. The wife obtained a sort of juristic independence in relation to her husband. The old opposition to the *manus* had completely attained its end, and there remained no remnants of the ancient forms of marriage, such as *confarreatio* or *coemptio*. The simple exchange of consent sufficed.<sup>2</sup>

The decay of the ancient marital institutions of Rome left vacant a wide field, into which the Church at once

<sup>1</sup> *Inst.* I, 9, 2.

<sup>2</sup> *Nov.* 117, 4, 4.

entered. This was especially the case in the West. But the conception of marriage under the law was the same as that of Modestine: "Marriage is a union of a man and a woman, by which the whole of life is partaken of in common, and all rights, human and divine, are freely exchanged between them" (*consortium omnis vitæ divini et humani juris communicatio*).<sup>1</sup> This conception also appears in the Canon Law,<sup>2</sup> although its meaning can be discovered only by reference to the ancient Roman marriage. Furthermore, the saying of Ulpian, that it is not cohabitation but consent which constitutes a marriage (*Nuptias non concubitus, sed consensus facit*), was made the corner-stone of all ecclesiastical legislation as to the nature of the act upon which a marriage is founded. In the matter of marriage the great work of Justinian, and all subsequent legislation, was concerned with the method whereby such exchange of consent might be proved.

In nothing was the influence of the Church more felt than in the matter of marriage. The impediments which arose from consanguinity had long been recognized. But the impediment arising from affinity first appears in the Theodosian Code, and is incorporated in the Justinian; in both appears the familiar principle that the wife's relatives are, by affinity, related in the same degree to the husband. Hence the marriage with a deceased wife's sister is prohibited equally with that with a deceased husband's brother. This step in advance was founded upon an entire reversal of the ancient idea of family. In the earlier times, the brother of the deceased husband was under the same *patria potestas* as the wife, but this was not the case with the sister of the deceased wife.

But though the woman's position had in many respects become like that of the man, yet, because of the circumstances in which she was placed, her property rights were neither secure nor satisfactory. The husband's right as to

<sup>1</sup> D. 23, 2, 1.

<sup>2</sup> C. 11. X. II. 23; C. 3. C. XXVII. q. 2.



the control of the *dos* during marriage was greatly limited, and at the same time the right of the wife and her heirs to recover it from the husband was increased. There had sprung up a custom that the husband should make a settlement upon his bride at the time of marriage. The property so settled remained in his possession during the marriage, but passed to his wife if she survived him. The *dos* and the *donatio ante nuptias*, afterward known as *donatio propter nuptias*, became closely connected, and in case of the husband's insolvency the wife could claim the *donatio*, as she could claim the *dos*. Furthermore, the *donatio* might take place after marriage and still remain valid. In case of a divorce for a cause which was the fault of the husband, the wife could obtain possession of both *dos* and *donatio*.

Yet it should not be concluded that the woman was placed on the same footing as the man. The law was in many respects in advance of public opinion. The innate conservatism of family life yielded but slowly to the advanced legal ideas. Women were naturally chiefly concerned in domestic affairs, and thus remained under the power of a sentiment which survived from those times in which the *patria potestas* and the *manus* existed. This lingered longer in the country districts than in the great cities. In Justinian's time women were no longer under tutelage. This legal conception, which had been almost lost in the time of Gaius, was not even mentioned in the Institutes of Justinian. The right of the mother to inherit from her sons in certain cases, and *vice versa*, had been recognized, but the whole subject was regulated anew by Justinian.<sup>1</sup> The advance made is indicated by the provision that where there was no express rule to the contrary, the masculine pronoun or noun included the feminine, but not *vice versa*.<sup>2</sup>

*Sub-section B. Property.*—The second great change

<sup>1</sup> Nov. 118.

<sup>2</sup> D. 50, 16, 1; D. 50, 16, 195.

was in the law of property. In this there were three principal innovations: as to the mode of conveyance; the change in the law of prescription; and the regulation of the system of emphyteusis.<sup>1</sup>

The mode of conveyance was radically changed by Justinian's abolition of the distinction between *res Mancipi* and *res nec Mancipi*—a distinction which had run through the Roman Law for more than a thousand years. The difficulties connected with the ceremony of mancipation had long since been felt to be so great that a sale *per æs et libram* had long been practically unknown. By the Theodosian Code a provision was made whereby *res Mancipi* were conveyed by a witnessed deed, *solemnis traditio*. But from the time of Justinian there was “no distinction between *res Mancipi* and *nec Mancipi*, between full ownership, bonitarian ownership, and *nudum jus quiritum*.” Movables and immovables were placed on the same footing as to method of conveyance.

Another important modification of the law was that whereby were fixed the length of time necessary to the acquirement of ownership and the conditions under which long possession wrought a prescription. The oldest Roman Law made the rough distinction between movables and immovables, and required possession for one year in the case of the former and two years in the case of the latter. The operation of this law was confined to Italy. By Justinian's legislation the law was made universally applicable, and the time of possession greatly extended. The following were the periods of prescription for different classes of things under various conditions:—

Three years for movables; *bona fides* and *justus titulus* indispensable. (That is, a legal foundation for ownership as opposed to a fraudulent one, and good faith of the purchaser as opposed to malicious intent.)

Ten years for immovables; *bona fides* and *justus titulus* indispensable.

<sup>1</sup> Cf. Muirhead, *op. cit.*, p. 419 f.

Twenty years for immovables, under the same conditions, when the owner was absent; that is, when the owner had no opportunity of knowing that his property was being continuously possessed by another. When he was present for a part of the time, a proportionate number of years was deducted from the twenty-year period.

Thirty years for immovables, where the true owner was unaware of his right, or for the following classes of things:—

Things belonging to the public treasury, when the treasury had legally parted with them.

Things originally stolen or taken by violence.

Things belonging to minors, or to children inheriting through their parents' marriage, but with which the father had illegally parted.

Or where *bona fides* or *justus titulus* were absent, in the case of things for which a shorter period than thirty years would otherwise suffice.

Forty years for all things not falling under any of the above classes, or which could not for other reasons pass in a shorter time.<sup>1</sup>

These great extensions of time were still further increased in the case of goods belonging to religious, charitable, or ecclesiastical institutions.

The principle of emphyteusis furnishes a connecting link between the Roman imperial system of land tenure and the mediæval system. It arose out of the custom whereby land taken in war was rented by the State on long leases. The rent paid in such cases was called *vectigal*, and the land was called *ager vectigalis*. It was a form of leasehold property especially advantageous to corporations of all kinds, inasmuch as they were relieved from all duties and cares as landlords and were assured of a fixed income. When this form was employed by private persons and corporations, it was known as emphyteusis, the land as

<sup>1</sup> Sheldon Amos, *Roman Civil Law*, p. 161 f.



*fundus emphyteuticarius*, and the person to whom the land was given as *emphyteuta*. An emphyteusis was a grant of land or houses forever, or for a long period,<sup>1</sup> on the condition that an annual sum (*canon* or *pensio*) should be paid to the owner — *dominus* — or his successors, and that if such sum was not duly paid, the grant should be forfeited.<sup>2</sup> According to the law of the Emperor Zeno,<sup>3</sup> (475–491), the emphyteusis was neither a sale nor a lease, but a special form of contract.

The rights of the *emphyteuta* were, first of all, the right of use and enjoyment. But he was better off than a mere usufructuary. He was rather the *bona fide* possessor of the property. The only restriction to his use of the land was that he must not cause depreciation in value of the property. Furthermore, he could, subject to certain restrictions, alienate the property. It passed to his heirs; it could be mortgaged or hypothecated;<sup>4</sup> and it could be burdened with servitudes.<sup>5</sup> But these rights depended upon the fulfilment of certain duties. If the *canon* was not paid for three years (in the case of Church lands, for two years), or if the land tax remained unpaid for the same period, the grant was forfeited. Here his position was different from that of the usufructuary, for the latter paid no rent. The original rent of the land granted could not be increased by the owner, but on the other hand it was not diminished by any partial loss of the property. The *emphyteuta* had to pay all the burdens attached to the land, and deliver all tax receipts to the owner. The method of alienating the property was as follows: "The *emphyteuta* ought to transmit to the *dominus* formal notice of the sum that a purchaser is willing to give for it. The owner has two months to decide whether he will take the emphyteusis at that sum; and if he wishes it, the transfer must be made to him. If he does not buy at the price named within two months, the

<sup>1</sup> D. 6, 3, 3.<sup>2</sup> D. 6, 3, 1. pr. D. 6, 3, 2.<sup>3</sup> J. Inst., III, 25, 3.<sup>4</sup> D. 13, 7, 16, 2.<sup>5</sup> D. 43, 18, 1, 9.

emphyteuta can sell to any fit and proper person without the consent of the *dominus*. If such a person is found, the *dominus* must accept him as his emphyteuta, and admit him into possession either personally, by written authority, or by attestation, before notaries or a magistrate. For this trouble, the *dominus* is entitled to charge a sum (*laudemium*) not exceeding two per cent on the purchase money. If the owner does not make acknowledgment within two months, then the emphyteuta can, without his consent, transfer his right to another and give him possession."<sup>1</sup>

A resemblance between the feudal system of land tenure and the Roman emphyteusis is discernible. Yet no direct connection between them can be shown. The connection is a matter of conjecture; yet the principle contained in the Roman law could not have been without influence upon feudal tenure at the revival of the study of law in the early part of the twelfth century. This revival brought clearly to notice the exact relations between the parties to conditional grants of land, even if the principles had not been clearly before men's minds in the earlier period. It is certain that during the Empire a species of emphyteusis was in use on the barbarian frontier, by right of which the veteran Roman soldiers held land along the lines of the Rhine and the Danube, in which military service took the place of the rent in money or corn. Here was the same sort of double ownership.<sup>2</sup>

*Sub-section C. Succession and Testaments.*—The changes made by Justinian in the law of succession were the logical result of the various tendencies which had long been evident in the development of Roman Law. These changes were important in two respects: in respect to succession, and in respect to testaments; or the selection of an heir by the operation of the law, and selection of an heir by will of the deceased.

<sup>1</sup> Hunter, *Roman Law*, p. 429. Cf. C. 4, 66, 3.

<sup>2</sup> Cf. H. S. Maine, *Ancient Law*, chap. VIII.

Intestate succession was entirely revolutionized and ordered by the Novels, especially by the 118th and 127th. The benefits here conferred were, however, limited to Christians of the orthodox faith. On this account the law was the more readily received by the Church, and was by it embodied in the Canon Law. Thence it passed into the law of Europe, including England. ~~No part of Justinian's legislation has had more widely spread effect upon the fortunes of men, or was generally accepted at so early a date.~~

But the Justinian legislation in this respect, radical as it may seem in some things, was not a sudden revolution. The way for it had been prepared by the slow progress of the law, especially in the hands of the prætors. Its main feature, as could have been anticipated, was therefore natural rights as opposed to those artificially created by the civil law. The claims of the agnates were not allowed to overrule those of the cognates. Men were not placed at an advantage over women. Blood relationship was in everything regarded as of supreme importance. Children born out of wedlock, but legitimated by subsequent marriage of parents, inherited with lawful issue. Emancipation did not deprive a son of his right to inherit, nor did the daughter lose her share because she married.

The order of succession was as follows: (1) descendants; (2) ascendants, together with brothers and sisters of the whole blood, with their children; (3) brothers and sisters of the half blood, with their children; (4) remaining cognates according to their various grades; (5) husband or wife; (6) the imperial treasury, or in certain cases others, as the members of the profession of the deceased, his firm, his partners, his church or monastery, or those to whom he was under certain obligations.

(1) Descendants were not debarred by sex or family relationship constituted by marriage or adoption. Should one or more children have previously died, leaving issue, the issue of such pre-deceased child would inherit its



parent's share, *per stirpes*. If none but grandchildren survived, these shared *per capita*. Children therefore inherited from their mother, whether they were born in or out of wedlock.

(2) The inheritance was divided without distinction between the ascendants of the paternal and maternal sides. Where there were several ascendants, the nearest in degree was preferred. Brothers and sisters of the whole blood shared equally with the nearest ascendants, and their children could inherit their parents' share. If there were no ascendants, the brothers and sisters of the whole blood divided the inheritance, their children taking a parent's share; but when none but nephews and nieces were left, it is uncertain what was the principle of division, whether *per stirpes* or *per capita*.<sup>1</sup>

(3) The brothers and sisters of the half blood, with their children, stood in the third order. The rules as to their children were in the same uncertain condition as those concerning the children of brothers and sisters of the whole blood.

(4) Cognates other than brothers and sisters of the whole or half blood, together with their children, stood in the fourth order and inherited according to their proximity. Those in the same grade shared alike, the nearer grade taking precedence of the more remote.

(5) Husband and wife were next in the order of succession, and could inherit from one another.

(6) Finally, in default of heirs, the estate fell to the imperial treasury, after four years, or to certain specified persons closely connected with the deceased.

In the case of a testament, the inheritance and the testament were governed by laws which were in many respects very different from those of early times. Nevertheless, the important matter was, as ever, the appointment of the heir, or *heres*. If the heir named in the will refused to

<sup>1</sup> Cf. S. Amos, *op. cit.*, p. 317.

accept the inheritance, the will became void, and the legatees did not receive the bequests made to them. In the legislation of Justinian, the heir was appointed merely to wind up the estate. In modern parlance, he was an executor,<sup>1</sup> and his appointment was for the benefit of the legatees. Formerly, he had been responsible for the debts of the deceased; he could therefore decline the inheritance. To free the heir from personal responsibility for the debts of the deceased, — allowed by Justinian if the heir made an inventory of the estate,<sup>2</sup> — was a direct breach of the traditions of more than a thousand years. But Justinian did not take the next logical step. He did not make the validity of the will independent of the willingness of the heir to accept the duties of the office.

The three forms of wills according to Justinian are the written will, the private nuncupative or oral will, and the public nuncupative will. The first was connected with the *jus civile* and the Prætorian Law. The essential point was that the will should be witnessed, signed, and sealed by seven competent witnesses,<sup>3</sup> and that the signature of the testator had been written in their presence. The private nuncupative will was merely the declaration, before seven witnesses, of the intention or wishes of the testator.<sup>4</sup> The public nuncupative will was effected by making the same form of declaration before a magistrate, or by a memorandum of the wishes of the testator, entered on the records of a court.<sup>5</sup> Other forms of wills were allowed to soldiers during a campaign, to blind persons, and to parents who bequeathed their property to their children. In the last case, the will could be quite informal.

The conditions of validity of a will were dependent upon the capacity of the testator, the appointment of a competent heir, the recognition of the claims of children and near relatives, the competency of witnesses, and compli-

<sup>1</sup> Cf. O. W. Holmes, Jr., *The Common Law*, p. 343 ff.

<sup>2</sup> C. 6, 30, 22, 1. <sup>3</sup> *J. Inst.*, II, 10, 3. <sup>4</sup> *Ibid.*, II, 10, 14. <sup>5</sup> C. 6, 23, 19.

ance with legal formalities. Of these conditions, the recognition of the claims of children was perhaps the most important. The law clearly stated that the child had a right to inherit from his father. Only on certain grounds of unfilial conduct could the child be passed over; but the child was privileged to bring proof that the charge was untrue. Failure to appoint a child as an heir might cause the will to be set aside, and this might also be done if the share given to the child was not a due proportion of the amount of the estate (*legitima* or *debita portio*), which share was fixed by Justinian<sup>1</sup> at one-third the amount which would have fallen to the child had the father died intestate.

The features indicated, though by no means exclusive, illustrate the conception of law held by the Justinian redactors.

### SECTION III. — SUBSEQUENT HISTORY OF THE JUSTINIAN LAW-BOOKS

The history and fate of the Justinian law-books may be divided into three parts: the history of the collection in the East, the history of the collection in the West (that is to say, in Italy, in connection with the conquest of that country by Justinian), and the history of modern Roman civil law dating from the revival of legal studies in Italy in the twelfth century. The first and second belong in immediate connection with Justinian's work; the third to the course of the legal development, which began with the barbarian codes and was stimulated and enriched by the revived study of the more refined system of Roman Law as embodied in Justinian's collections.

These points should be clearly noted in the history of the work of Justinian in the East. The collections of that emperor were, with the exception of some Novels, written in Latin, and although that language was the official language of the courts, it was rapidly becoming unknown in

<sup>1</sup> Nov. 118.



the East. It remained the language of the administration and the courts of justice for only forty years after the death of Justinian, or until 602 A.D., the date of the accession of Phocas. The necessity of translation into Greek inevitably carried with it the composition of commentaries, which at last supplanted the actual text of Justinian. The legislation of subsequent emperors was as much based upon these commentaries as upon the Code, Digest, and Institutes. The law-schools were entirely under Greek influence and Greek teachers. Finally, the territories which were subject to the authority of the Eastern Empire were constantly diminishing before the advance of the Mohammedan forces.

The Institutes of Justinian were translated, or rather paraphrased, into Greek by Theophilus, who had taken part in the composition of the original work. This was the edition of the Institutes which became generally known in the East. The Digest was the subject of a translation and commentary executed in systematic fashion by the professors of the great law-schools of Constantinople and Berytus. Theophilus, Dorotheus, Isidorus, Stephanus, and others wrote commentaries on the Digest. The Code was of course the object of elaborate comment and exposition. There were commentaries by Anatolius, concise, with a translation; by Isidorus, more extended; and by Thalelæus, a translation with a still more elaborate commentary. There were also abridgments. Philoxenus and Symbatius wrote on the Novels. The literary activity of the professors of law, and probably of the lawyers themselves, was very great. The legal renaissance of the sixth century was short-lived; and the seventh century was singularly devoid of any great scientific interest in legal matters. In 717 the law-school at Constantinople was closed, and so remained for a century and a half.

It must not be supposed that the Justinian legislation, even in the modified form in which it appeared in Greek,

was uniformly spread over the East. There was already in circulation an earlier collection, referred to above, which first became known to modern scholars in the Syrian translation, and which has been found in many recensions. This book belonged to the post-Theodosian and ante-Justinian period.

The constant appearance of fresh Novels and regulations in time rendered necessary new collections. These collections or codes were promulgated by the imperial authority. The first of these was the *Ecloga Legum*, or the Isaurian Law. This was prepared in 740 by a commission acting under the direction of the Emperor Leo III, the Isaurian, and of his son, Constantine Copronymus. It contained an introduction and eighteen titles. An appendix contained the maritime laws of Rhodes, the Georgian, or rural, laws, and military laws. This collection was superseded by the Prochiron, published in 878 by Basil the Macedonian and his sons Constantine and Leo the Philosopher. This contains forty titles, made up of selections from the previous collection and from the commentaries upon, and abridgments of, Justinian. This collection was soon reissued in an improved edition, known as the *Epanagoge Legis*, and published by Basil and his sons Leo and Alexander. "The Prochiron and the Epanagoge became, both in Byzantine jurisprudence and practice, till the end of the Eastern Empire, the constant recourse and chief authority of the lawyer; but the most important portion of this legislation is the Basilicæ."<sup>1</sup> The Basilicæ or Basilica — τὰ Βασιλικὰ νόμιμα or αἱ Βασιλικαὶ διατάξεις — "the imperial laws or constitutions" (so called without any reference to the name of the emperor), were published under Leo, his brother Alexander, and his son Constantine Porphyrogenitus (906–911 A.D.). It is an attempt to cover the whole ground of the law, as the Jus-

<sup>1</sup> Ortolan, *Histoire de la Législation Romaine et Généralisation du Droit*. Trans., London, 1871, p. 593.

tinian collections had done. It was to include not merely Justinian, but also the many laws which were abrogated by omission from the Code or Digest. It was also intended to include the more recent legislation. No complete manuscript of this important work exists to-day, but from what remains it is not difficult to see that little effort was made to give the original laws with any great degree of accuracy. The compilers were content with abridgments, commentaries, translations, and the Prochiron. So far as concerned the contents and arrangements of the collection, it was an attempt to do away with the distinction of Code, Digest, and Institutes. One work, divided into sixty books and subdivided into many titles, was to include all three of the older works. The authority of this work, however, was inferior to that of the Justinian publications. The Basilica did not supersede all other law; it was not compiled with the intention of furnishing the sole code for the Empire. But the result was the same. The work of Justinian became increasingly subordinated to the practical convenience afforded by the Basilica, and in the last part of the eleventh century the latter entirely took the place of the Justinian law-books.

The Prochiron and Epanagoge, as well as the Basilica, were authoritative imperial publications. They were accompanied by a number of private compilations, abridgments, and commentaries. They were subjected to revision by private hands. One of the latest and most famous of these compilations was the Hexabiblos of Constantine Harmenopulos of Thessalonica, published in 1345. This was an excellently arranged system of law in six books, divided into eighty titles. It was compiled from the authoritative codes and the various abridgments. This was probably the most famous of later law-books, and it was largely through this work that the knowledge of Roman Law became general throughout the East.

In addition to the works on secular law, there were the



collections made of the ecclesiastical laws. These played no small part in the jurisprudence of the East. Great compilations, in which the canons were compared with the civil law, were made. These Nomocanons were soon cast into systematic form (*syntagmata*) and treated in the same manner as the other legal works. The Nomocanon of John of Antioch, who subsequently became Patriarch of Constantinople, was published as early as 564. The learned Photius enlarged and reviewed it, publishing his edition in 883. Among the later canonists the most celebrated were John Zonaras, of the twelfth century, and Theodorus Balsamon, of the latter part of the twelfth and first part of the thirteenth centuries. These men were favorably known even in the West.

The fall of Constantinople in 1453 may in one sense be regarded as the termination of Roman Law in the East; for after that event the law was no longer promulgated by authority, but remained only as a tradition. Yet, in spite of Mohammedan rule, the Roman Law has continued in various forms in the East until the present day. The Mohammedan law itself was strongly influenced by the Roman Law, primarily by the presence in the conquered regions of the Roman institutions in various stages of efficiency. Although the Moslem law is popularly supposed to be founded upon the Koran, it is, with the exception of a very few points,<sup>1</sup> based upon other authority. That this authority was largely Roman Law is antecedently probable, because of the fact that the Mohammedans did not attempt to reorganize the conquered provinces. The existing institutions were in great part allowed to continue. Further evidence is found in the fact that the Mohammedans were willing to borrow from the Greeks their philosophy and science. An examination of Mohammedan law, as it actually exists, everywhere shows striking resemblance to that of the Romans in arrangement of subjects and gen-

<sup>1</sup> Cf. S. Amos, *op. cit.*, p. 409 ff.

eral matter. It is extremely improbable that this was the invention of the Moslems. As Amos says,<sup>1</sup> "Mohammedan law is nothing but the Roman Law of the Eastern Empire adapted to the political conditions of the Arab dominions."

In general, in the administration of conquered European provinces, the Mohammedans expressly or tacitly allowed the conquered to retain their own laws as to disputes among themselves. This was the case in Greece, in the Greek islands, in Servia, Moldavia, and Wallachia. In these countries the Roman Law was retained in the form of abridgments and compilations dating from a period later than that of the Basilica. Especially important was the Nomocanon of Malaxos, published in 1562.

In the independent modern kingdom of Greece the later form of the Roman Law has been made the foundation of the existing law; that is, it has been recognized by the legislature as binding, and has been made the basis of the various national codes. The continuation of the Roman Law in many Greek-speaking countries and in parts of Russia is enough to warrant the assertion that the authority of the Roman Law has never been abrogated in the East.

The significance of the Justinian conquest of Italy in 554 was not the introduction of the Roman Law, for that law had never ceased to be enforced there, and the barbarian codes had done little more than give the authority of the conqueror to that which was already law. But it established there the Justinian form of the Roman Law, and insured its maintenance for about three centuries. The Byzantine authority lasted in full force and extent for only fourteen years. A large part of the Roman Empire was conquered by the Lombards in 568. Rome, however, remained nominally under Byzantine authority until 726. In 752 Ravenna, Pentapolis, and Istria were

<sup>1</sup> *Op. cit.*, p. 415.

conquered by the Lombards, and all these subsequently passed under the rule of Charlemagne. For nearly a century longer there remained subject to Constantinople, Naples, Pisa, and the southern shores of the peninsula. These became free in the course of the ninth century. As long as the Byzantine authority continued, the Justinian Roman Law was statute law. After the termination of that authority, the same law remained as customary law, and never lacked students or was without application. In addition to the force of habit — which must have been very potent in maintaining the use of the law — there was the constant presence of the Church, which in every part of Europe was in a certain sense committed to the support of the Roman Law. But the texts of law which were studied in the centuries between the extinguishment of Byzantine authority in Italy and the revival of the study of Roman Law at Bologna, were in all probability the corrupt paraphrases and epitomes that were embodied in various codes or preserved in independent treatises. In the universal intellectual degeneration of the tenth century, there would hardly have existed the capacity to appreciate or employ the Code and Digest in their original form.<sup>1</sup>

<sup>1</sup> Further discussion of this subject belongs to the part of this work treating of the later period of Roman Law and the barbarian codes.

X



## CHAPTER XII

### CANON LAW

#### SECTION I. — ORIGIN AND GROWTH

PARALLEL with the study of the Roman Law in the universities of Mediæval Europe proceeded the study of the Canon Law. One was the law of the old Empire which had been revived; and as such was thought to be in some way binding on that Empire. The other was the law of the Church, which included the Empire in its dominion and claimed authority over districts which had never been subject to the Cæsars. The Civil Law commanded respect by the authority of its tradition, by its antiquity, and by the scientific beauty of the form in which it was presented. The Canon Law was a necessity in the daily life of the greatest existing institution, the Catholic Church. By its provisions every man was governed, and in many acts of his life he was brought immediately under the rule of its workings.

The Canon Law is general as well as personal. It proceeds upon the assumption that the Christian Church is an actual society, organized by the Apostles while acting under the immediate command of their Master; that it is the organ of the Holy Ghost, who dwells in the Church, animating, guiding, and controlling its work; and that only in and through the Church and its sacraments is possible the salvation of the individual. This society, known as the Church, was organized upon a determinate plan, with officers whose authority was personal and transmitted from officer to officer according to a divinely established law. The order of rank was carefully adjusted. Unity of the

whole society in implicit obedience to one authority was the only union with the Head, in whom alone was salvation possible.

Thus the member of the Church found that he had become a member of a society which was coextensive with entire Christendom, and in which national distinctions disappeared; he was a citizen of the whole world, in a kingdom which was heavenly and spiritual, yet was manifest on earth.

However clearly the principles which underlay the Canon Law may have been recognized in the Middle Ages and the later periods, they were not distinct in the minds of men during the patristic period. Three causes might with justice be said to have retarded the development of the Canon Law in the early centuries of the life of the Church.

1. The Church was hindered by persecution from perfecting its organization. The natural form of this organization would have been a counterpart of the Roman Empire, having a central authority in Rome. Quite apart from any divine warrant for a primacy in the See of Rome — a point which need not here be discussed — there was abundant evidence of a tendency toward consolidation. Because of the persecutions of the Church, this tendency was repressed for some centuries. A theory of an universal episcopate in which all bishops shared especially obtained in those parts of the Church which were not near to Rome.

2. By the prevalent heresies the Church was compelled to devote its attention less to the perfecting of its constitutional and legal system — or rather the apprehension of the principles underlying that system — than to the development and precise statement of the essential articles of faith. Discussion of legal questions was meagre, though the need of an authoritative determination of the creed was felt; this need to some extent led to the greater unity

of the Church and adherence to the Apostolic Sees. The ecclesiological discussions were chiefly in connection with the Donatist schism, and belonged to a period in which the main interest was theological.

3. The development of the Church toward an orderly system of law was to no small degree hindered by the alliance between the Roman Empire and the Church. The immediate result was primarily to render the Church subordinate to the Empire. The Eastern Church always remained under imperial authority, was more and more cut off from the West, and finally entirely separated. The Western Church began the development of ecclesiastical jurisprudence at a time practically coincident with the fall of the Western Empire, or between the reign of Constantine — when the seat of the Empire was transferred to the East — and the pontificate of Gregory the Great.

The development of Canon Law dates from the rise of the Roman Patriarchate to supremacy in the West, and was the work of the Western Church. The Eastern Church has followed its own course of development. Its position under the domination of the Byzantine Court, the Mohammedan Empire, and the Russian imperial system, has rendered impossible a law in any respect comparable with the jurisprudence of the West. The Canon Law which has entered into the systems of jurisprudence of nearly all European countries has been that of Rome.

The sources of Roman Canon Law are, in general, the canons of synods and the decretals of the Roman pontiffs. The synodal system of the Church was a natural imitation of the council of the Apostles at Jerusalem.<sup>1</sup> Local bishops came together to condemn some local heresy. Their determinations were of binding force only in their own dioceses; but their example was followed, and similar condemnations were passed at synods held in other places. The canons of a council were often sent to a prominent

<sup>1</sup> See Acts xv.



bishop in a distant part of the empire. He gathered together his fellow-bishops, that they might approve the canons sent to them. The step from the local synod to the general council, or ecumenical synod, became possible on the union of the Roman Empire with the Christian Church. The canons and decrees of a general council were binding on the whole Church, inasmuch as the whole Church was supposed to be represented. As a matter of fact, at the early general councils only the Eastern Church was adequately represented, and at the later ones only the Western Church.

Although councils were held for many centuries, and many canons were promulgated by them, the decretals of the popes, or bishops of Rome, formed a far more prolific source of Canon Law. These decretals were letters addressed by the pope to various parts of the Church. The principle on which they were to be received was thus stated by Pope Agatho at a council at Rome in 680: "All the ordinances of the Apostolic See are to be accepted as if they were proclaimed by the blessed Peter himself."<sup>1</sup> This was merely the expression of a position which the Western Church had been approaching for more than three centuries. The supreme authority of the Roman See was therefore the tacit assumption underlying the formation of much of the Canon Law. This authority found its expression in the decretals, of which the first genuine and complete epistle preserved is that of Siricius.<sup>2</sup> From this pope onward, the recognition of the position of the Roman See in the constitution of the Church became continually clearer, and the statesmanship of such men as Leo the Great and Gregory the Great was able to make the Petrine prerogatives the bulwark of the faith and the foundation of a vast spiritual empire.

<sup>1</sup> *Sic omnes Apostolicæ Sedis sanctiones accipiendæ sunt, tamquam ipsius divini Petri voce firmatæ sint.* C. 2, D. 19.

<sup>2</sup> 384-398 A.D.

It is a characteristic of the Canon Law that it covers nearly the entire field of Christian life. It is the outward expression, in a legal system, of the Christian faith; at once the constitution of a divine society and a law binding the individual. It is therefore most intimately connected with the pastoral office of the Church. This law is the immediate outgrowth of the Church's system of discipline, and is based upon the confessional. By this, each member of the Church is placed before a judge, by whom the minor matters are decided, the graver reserved for the decision of a superior authority. But grave offences against the law of the Church led to ecclesiastical trials, which were frequently — in the earlier years, generally — before ecclesiastical councils. Appeals were made, and the case was carried up to the highest courts, or the Roman pontiff. This system, by reason of its personally inquisitorial methods, was the most effective ever known; it found its culmination in the Middle Ages — or, to give a more precise date, in the pontificate of Innocent III. Since then the system has remained much the same in form, but its sanctions are less terrible, and its effects upon the world are brought about by more spiritual means.

The code by which the Western Church was governed, and by the rules of which justice was administered, was not completed until just before the Reformation. Attempts were often made to produce a code which should embrace all the law of the Church. The earliest of these collections were very unsystematic in their arrangement. They contained the canons of the general councils and of the councils confirmed by them. As these canons were of Eastern origin, they were known in the West for the most part in translation rather than as originals. The monk Dionysius Exiguus (*ob.* 536) made collections of those canons and decretals which were generally received. The collection of canons was made in 496–498. The collection of decretals contained all from Siricius to

Anastasius (498–514), inclusive, and was made under Symmachus, the successor of Anastasius. Various editions of these works were put forth. In 774 Hadrian I sent an enlarged edition to Charles the Great. This redaction, the Dionysio-Hadriana, was formally accepted by the emperor, in 802, as the *Codex Canonum* of the Frankish Church. Its position was similar to that of the more elaborate works which have supplanted it. It was provided with a gloss before the end of the ninth century.

But the Dionysian was by no means the only collection, although it was that which became predominant. Similar collections were made in many countries. That made in Africa was based upon the Dionysian. The *Collectio Hispana* was independent, and attained a systematic form in the seventh century. This collection was erroneously ascribed to S. Isidore of Seville, to whom the pseudo-Isidorean decretals were later attributed.

The next important development of the law of the Church came with the so-called Forged Decretals of the ninth century. These were decretals which purported to have been issued by popes who were for the most part earlier than Siricius. Some of these decretals are genuine in substance, but are antedated. Some contain matter of doubtful authority. Some are gross forgeries. The evidences of this forgery are patent to the modern critical eye. That these decretals were ever accepted is a sure indication of the state of learning in the ninth century. It should not be hastily assumed that this collection was forged for any one purpose or at one time. A number of the forgeries were in circulation in the early years of the ninth century. The general drift of these new laws was not the aggrandizement of the Roman See, as is popularly supposed, but the emancipation of the bishops from the civil authority and from the control of metropolitans. These two authorities were closely allied. The power of the metropolitanate was that of a semi-independent and



local Church, which in the divided Empire might become a national Church. The power of the Roman See to the local bishop was a guaranty of freedom from the oppression to which he might at any time be subjected from the union of the civil and the ecclesiastical authority. When the bishop was able to carry his case directly to the pope, he was freed, and the power of the metropolitan was broken. It is very doubtful whether the political system of the Roman See was immediately the gainer by these forgeries.<sup>1</sup>

Another source of Church Law in the early centuries of the Middle Ages was the Penitential Books. These were aids to confessors in dealing with penitents, and determined the amount of penance appropriate to particular sins. Together with these rules were other ecclesiastical directions. These books were exceedingly numerous, and exercised great influence in the practical affairs of Church life. They did not produce a customary law, as distinguished from statute or Canon Law. Parts of them have been directly or indirectly transferred to the *Corpus Juris Canonici*; yet they were less important in their legal effect than might have been expected.

The pseudo-Isidorean collection was the last to be arranged on a purely chronological system. Thenceforth a logical arrangement was followed. A great number of collections appeared between the ninth and twelfth centuries, no less than thirty-seven being enumerated by Walter.<sup>2</sup> The most important of these collections are the following: that of Anselm of Milan (883-887); the *Libri duo de Synodalibus Causis* of Regino of Prüm (906); the *Decretum* of Burchard of Worms (between 1012 and 1022); the collections of Anselm of Lucca (1086); of Deusdedit (1086-1087); and Bonizo of Sutria (1089). All these,

<sup>1</sup> G. C. Lee: *Hincmar. An Introduction to the Study of the Revolution in the Organization of the Church in the Ninth Century.* N. Y. 1897.

<sup>2</sup> *Kirchenrecht*, § 100.

with the exception of the second named, drew lavishly from the pseudo-Isidore. Still more important were the *Decretum* and the *Panormia* of Ivo of Chartres (1117), who borrowed largely from Burchard of Worms, and the two works of Algerus of Lüttich (1121) respectively entitled *Liber de Misericordia et Justitia*, and *Liber Sententiarum*. Upon these two writers the first part of the *Corpus Juris Canonici*, or the *Decretum* of Gratian, is based.

All the collections of canons, with the exception of the Dionysio-Hadriana, were private collections, or text-books. They were compilations made in different parts of the Empire, and they betrayed their origin by the prominence given to the utterances of local synods. They resulted in an enormous number of contradictory canons, and much confusion in the legal system of the Church.

## SECTION II. — FOUNDATION OF THE CORPUS JURIS CANONICI

The monk Gratian of Bologna, a professor of Canon Law in the University of Bologna, was able, about the end of the year 1150, to produce from the mass of accumulated treatises a work which was on the whole consistent and, above all, so arranged as to be useful as well in the actual administration of the law as in the lecture room. The University of Bologna had already become famous for its professors of law. Large numbers of students of the ancient law flocked thereto from all parts of Europe. The Justinian Code was in their possession, and all Christendom had been stirred to new enthusiasm over the law of the Roman Empire. In comparison with the state of the Civil Law, that of the Canon Law was deplorable. The canonists were completely eclipsed by the civilians. It was under these conditions that Gratian's monumental work appeared.

Its aim was twofold: practical and theoretical. Its author called it *Discordantium Canonum Concordia*, to indi-

cate, by this title, his purpose of reconciling the contradictions prevalent in earlier collections. But it was generally called the *Decretum*, and the name of *Corpus Juris Canonici* was also applied to it. Gratian and his pupils at Bologna made it the basis of lectures. Soon a gloss was written upon it, and this rapidly became an elaborate apparatus.

The authority of the *Decretum* was merely that of a private collection. The work was composed of three constituent parts: the principles, deduced by Gratian; the citations necessary to prove those principles; and comment by the author. The portions composed by Gratian have only such authority as attached to the opinion of a learned canonist of the school of Bologna. The citations have authority, but only as citations; and this authority varies, since the decree of a local council or the opinion of an ancient Father has much less intrinsic authority than the canon of an ecumenical synod or the decretal of a sovereign pontiff. A quotation from a spurious decretal or an interpolated or forged canon of a council gained no force because of mere citation. Even the official publication of the *Decretum* has never given it authority. Nevertheless, the importance of the work has been but little diminished by its lack of authority. It was the foundation of all canonical studies, and moulded the ecclesiastical thought of succeeding centuries.

The *Decretum* consists of three parts. Part I is divided into one hundred and one *distinctiones*, and discusses the sources of law of ecclesiastical personages and offices. Each *distinctio* is subdivided into a number of *Dicta Gratiani* and *Canones*. In former times, this part was cited merely by the initial words of the *canones*, but the modern method of citation is by abbreviating as follows: C. 25. D. 63; this means the twenty-fifth canon of the sixty-third distinction. This canon was formerly cited as *Cum longe*, these being its first words. This



modern system of numbering, which has prevailed since the edition of Le Conte (Paris, 1556), includes not merely the original work but also the one hundred and fifty additions made by Paucapalea and other disciples of Gratian, and known as *paleæ*. Part II consists of thirty-six *causæ*, or legal cases, propounded by Gratian. Each is subdivided into a number of questions, or *quæstiones*, and these latter are answered in a number of *canones*. The present method of citing is as follows: C. 36. C. II. q. 7.; this means the thirty-sixth canon of the seventh question of the second cause. The third question of the thirty-third cause is an independent work, the *Tractatus de Pœnitentia*. It is divided into distinctions and canons, and is cited as is the first part, with a reference to the tractate, e.g. C. 2, C. 5., *de pœnitentia*. Part III discusses the form of worship of the Church, and is known as *de Consecratione*. It is divided into five *distinctiones*, and again into *canones*. It is cited as follows: C. 129; D. 4. *de Consecratione*.

Gratian included in his *Decretum* the decretals of the popes, up to and including those of Innocent II (1139). But a very large number of decretals appeared very soon after the completion of Gratian's work. In 1179 the third Lateran Council was held under Alexander III, and in 1215 the fourth, under Innocent III. This was the most important period of papal legislation, the culmination of papal authority. Gratian's work rapidly became antiquated, although still used as a basis of instruction. Before 1234 there appeared no less than seventeen compilations, of which five, originating in Bologna, were the most important. These five, known as *Quinque Compilationes Antiquæ*, were the foundation of subsequent works. Two were compiled by authority of the popes. Innocent III caused Petrus Collivacinus to make a collection of his decretals, which was known as the *Tertia*, and was the first official collection. Honorius III caused to be made an

official collection of his decretals, known as the *Quinta*. But the most important was the *Prima*, a private work, made by Bernhard of Pavia about 1191. It was called by its author *Breviarium Extravagantium*. It is divided into five parts, arranged as follows: *Judex*, *Judicium*, *Clerus*, *Sponsalia*, *Crimen*. The division according to this hexameter was followed by all other compilers, and became the classical form, being followed in all the later official collections. Under *Judex* were treated the ecclesiastical offices and judges; under *Judicium*, procedure in contentious litigation; under *Clerus*, personal relations, duties, and matters of property; under *Sponsalia*, marriage; under *Crimen*, criminal law, procedure, and penalties.

The first great official collection was that made, at the command of Gregory IX, by Raymond of Pennaforte, a Dominican monk, formerly professor at Bologna, and at the time penitentiary of Gregory. The collection was made after the model laid down by Bernhard of Pavia, and was composed of the decretals issued after the time of Gratian. Frequently only portions of decretals were cited; and the facts of the cases decided by the decretals were generally omitted, being indicated by the phrase *et infra*. These *partes decisæ* have been reinserted in nearly all modern editions since that of Le Conte,<sup>1</sup> as without them the decision would frequently be unintelligible. The decretals were arranged in chronological order under the various titles of the several books. The titles themselves were arranged in more or less logical order. The whole was published in 1234 by Gregory IX, by transmission to the universities of Bologna and Paris. The collection was official and authoritative in every part. It was regarded, as a whole, as the law of the Church, promulgated by Gregory IX. It forms the basis of all more recent Canon Law, and is still authoritative and in force,

<sup>1</sup> See p. 333.

although in many respects superseded by more recent legislation, which has arisen in the change of circumstances and conditions under which the Church carries on its work.

The collection of Gregory is indicated by the letter X, meaning *Libri Extra Decretum*, and is cited by chapter, book, and title, as follows: C. 5, X. *de rebus ecclesiæ alienandis* [lib.] III. [tit.] 13; by which is meant the fifth chapter of the thirteenth title of the third book of the decretals of Gregory IX. The title is generally given, as above, but is sometimes omitted, when the above citation would read: C. 5, X. III, 13, and would be quite as readily understood.

No single ecclesiastical code could possibly contain the entire law of the Church, which was constantly increasing. The decretals were poured forth from the papal court in undiminishing abundance, and a supplement to the official collection of Gregory was soon needed. This was attempted by several popes, and was finally cast in a permanent form by Boniface VIII. This publication was the *Liber Sextus*, — so called because the Gregorian collection contained five books, and the new was regarded as a continuation of the earlier work. It was, however, less a continuation than a supplement. It was divided into five books, corresponding to the five books of the Gregorian Code, and treating of the same matters. All decretals issued since the time of Gregory IX, and not contained in this book, were, with a few exceptions, declared invalid. The new collection was published by the bull *Sacrosanctæ*, and copies were sent to Paris and Bologna, as the centres of legal learning. The *Liber Sextus* is cited as follows: c. 4 *de sepulturis* in VI<sup>to</sup> [lib.] III [tit.] 12, or c. 4 in 6<sup>to</sup>, III. 12; meaning the fourth chapter of the twelfth title of the third book of the *Liber Sextus*.

A third official collection was soon needed. This was prepared by Clement V, immediately after the Council of Vienne (1311), and was published in a consistory held in



1313. It did not come into force, however, until 1317, as Clement died before he could send it to the universities of Bologna and Paris. This was done, in the year mentioned, by John XXII. This collection, although of authority, was not exclusive authority for all law published after the completion of the *Liber Sextus*. The omission of decretals published between 1298 and 1317 did not affect their validity and binding force.

These three collections, together with the *Decretum Gratiani*, became generally known as the *Corpus Juris Canonici*. They were to be used for all cases *in scholis et in judiciis*: that is to say, for all instruction and all trials. The *Decretum* was retained because of its practical value as indicating the traditional law of the Church. To this *Corpus* were added, in the edition of Jean Chappuis (Paris, 1500), a number of decretals of John XXII, known as the *Extravagantes Joannis XXII*, collected by Zenzelinus de Cassanis in 1325, and also upward of seventy decretals of other popes, known as *Extravagantes Communes*. The latter were so called because they were the *extravagantes*, or decretals, not in the *Corpus Juris Clausum*, but were commonly printed with those of this collection. These decretals were arranged in five books, in the order of the Gregorian collection. The two added collections are respectively cited as follows: *c(aput) un(icum) xvag* (or *Extravag.*) Jo. XXII *de tormentis* [tit.] 9.; and *c(aput) 2. xvag. commun de privilegiis* [lib.] V. [tit.] 7. These two collections, although retained in all editions, have not the same standing as those first mentioned. Both were private collections, and of authority only as far as any private collection could be authoritative, that is, because containing laws in actual force. They did not possess the authority of an officially promulgated code.

An official edition of the *Corpus* was published in 1582, by order of Gregory XIII, under the editorial supervision of Francis Pegna and Sixtus Fabri; it contained the valu-

able notes and emendations of the *Correctores Romani*. The two collections of *Extravagantes* were included in this edition, and they have therefore been generally regarded as practically operative.

The *Liber Septimus*, the work of Petrus Matthæus of Lyons, finished in 1590, is of no authority, although it is printed in some editions of the *Corpus*. In the same position of non-authority is the useful little work of Paolo Lancelotti called *Institutiones Juris Canonici*, although it was drawn up by papal command in imitation of the Institutes of Justinian. By permission of Paul V, this has also, since 1605, been appended to the *Corpus*.

The *Corpus Juris Canonici* has been published in two forms: with and without gloss. The last and best glossated edition is that of Lyons, 1671, in 3 vols. fol. This does not contain the *partes decisæ*. Another excellent edition is the *Corpus Juris Canonici cum notis Petr. et Franc. Pithæorum*, edit. Claud. Pelletier, Paris, 1687, and several times reprinted. Of the editions without gloss, the best are those of Justus Henning Böhmer, Halle, 1747; Æm. Richter, Leipzig, 1833; and a second edition of Richter, by Friedberg, Leipzig, 1877-81. Böhmer gives the text according to his own critical opinion, and adds the variations of the *Correctores Romani*. Richter and Friedberg give the Roman text, and add their own critical notes and variations. The edition of Böhmer, although in part rendered antiquated by modern investigation, is still of great value on account of its many useful indices and supplementary matter.

### SECTION III. — ECCLESIASTICAL JURISDICTION

The Canon Law, in so far as it was not constitutional law of the Church, chiefly concerned itself with ecclesiastical property and the cure of souls. In all three parts of the law, respectively concerning constitution, property, and personal rights and duties of individuals, an impor-

tant impress was left upon the jurisprudence of Western Europe. All lands came under the influence of this great system. In all European countries the leading lawyers were, at one period, ecclesiastics, and the measures of the Canon Law were constantly calling for recognition. The reception of the law might be various in various countries, but its effect was generally the same.

The Canon Law regarding the constitution of the Church was based upon the idea that the Church was an institution distinct from, and independent of, the State. The Church might enjoy the protection and assistance of the secular arm; but it employed that arm as its right. The State was founded upon the instinct of nationality. Even in the Holy Roman Empire there was only a feeble sense of nationality as a whole, and the component parts were always ready to fall asunder. But the Holy Roman Church was in reality that which the Empire was merely in theory. It could not regard national boundaries. Its whole history was that of a struggle with the hindrances of nationality. The Church, in the development of this principle of supra-nationality, therefore claimed exemption from secular authority. It claimed the right to nominate all its own officials, or to regulate the law whereby lay persons might nominate to benefices. It claimed immunity of all ecclesiastical persons from any secular jurisdiction. It established its own courts for the trial of criminous clerks of every degree. It claimed jurisdiction in a vast number of causes which in modern times would be regarded as matters of civil jurisdiction, but which were formerly classed as cases pertaining to the cure of souls.

The ecclesiastical courts derived their jurisdiction from the Pope, and not from the sovereign of the country in which they might be located. They were a part of that great system in which sovereigns were merely laymen. The law administered in these courts was papal law, and



was binding upon all men, from serf to sovereign. It was the law of Peter, Prince of the Apostles and Vicar of Christ. Such matters as marriage and divorce were for the Church's determination, without reference to the status of the persons concerned, and the law governing such matters was Canon Law. The Canon Law was, theoretically, everywhere in force. But in practice there were great exceptions to this rule. These exceptions were composed of two classes: the limitations caused by the encroachment of secular princes upon the ecclesiastical legal system,—or limitations to the authority of the Church in its encroachment upon the secular legal system, for both aimed at universality,—and the limitations caused by the customs of particular districts and local Churches. But there was no such thing as the picking and choosing of decretals, or any supposed authority given to a papal decretal by any local acceptance. If local councils repeated papal decretals or laws, it was not to make them binding, but to make them generally known. A decretal was binding simply and solely because it was of papal origin.<sup>1</sup> It was through the independent courts of the Church, acting under papal authority, that the Canon Law everywhere obtained foothold.

The restrictions placed by the secular authority upon the Church courts were generally of the nature of prohibitions of the cognizance of particular cases rather than of the law. Thus, in England, the cases of advowsons were not tried in the ecclesiastical courts, though jurisdiction in all matters of patronage was claimed by the Canon Law. In France, on the other hand, the probate of wills, which in England was part of the functions of the ecclesiastical courts, was not allowed those courts,

<sup>1</sup> This statement is at variance with the traditional English view, so far as English Canon Law was concerned, but is concurred in, in its relation to England, by Professor F. W. Maitland, in his most valuable treatise, *Roman Canon Law in the Church of England* (1898).

though this function was also claimed by the Canon Law. From the very nature of the case, there were in nearly every country limitations to the Canon Law, for the simple reason that, according to its claims, by some construction of its provisions, nearly every possible act might be brought to trial before a spiritual tribunal. In the Middle Ages the adjustment of the boundaries between the two jurisdictions was uncertain and precarious. A vigorous and ambitious ruler, if unchecked by the pontiff—possibly feeble or occupied with other cares—might widely extend the jurisdiction of his own courts. The opposite case might also occur, and often did occur. In modern times the same question has more than once arisen, but it is for the most part determined by the concordats existing between the various governments and the Holy See.

The limitations to the binding effect of the Canon Law which arose from custom were even more important than those resulting from the opposition of the civil authorities. The customary, or unwritten, law had in great part created those institutions which were most important to the Church. The decretals merely converted the *jus non scriptum* to the *jus scriptum*. Throughout the Church there existed local usages which had all the force of laws. These *consuetudines*, which were provided for by the *Corpus Juris Canonici* itself, might be either contrary to (*præter*), or agreeable to (*secundum*) the *jus scriptum*. They might either extend and amplify, or alter, the law. They might be either a custom of the whole Church,—*consuetudo ecclesiæ generalis*; or the custom of a single province or diocese—*consuetudo particularis*. Such customs prevailed in many portions of the Church, and were permitted to continue, even when directly contrary to the provisions of Canon Law. The ground for this was simple expediency. If the customs had been contrary to the *jus divinum*, they could not have been tolerated; but

the Canon Law was by no means coextensive with Divine Law. The former was mostly *jus humanum*, and as such could not be enforced with equal rigor in all parts of the Church. In addition to the direct provision in the *Corpus* for the legal validity of a customary law, there was, it need hardly be said, a basis for its continued use in the failure of ecclesiastics to enforce the Canon Law.

The Church's law of property was that the property devoted to pious purposes—that is, to the Church—should be subject only to the law of the Church. This, because of the feudal relations connected with land tenure, brought about a constant conflict with the secular power. The lands of bishoprics and a large part of the endowments of monasteries, and other great ecclesiastical foundations, were everywhere subject to feudal obligations. Everywhere the secular power claimed authority in disputes about such land, as well as jurisdiction over persons who enjoyed the land. Here the Church met with a check on all sides. In the matter of tithes, however, where there was no feudal obligation involved, the ecclesiastical courts and the Canon Law generally governed.

#### SECTION IV. — THE LAW OF MARRIAGE

The position of the Canon Law in regard to the cure of souls was very firmly maintained. Here the most important part of the law was the law of matrimony, which in many countries is still intimately connected with the Canon Law. The Church claimed cognizance of all such matters, on the ground that matrimony was one of the seven sacraments. Marriage was closely connected in all its essential principles with divine revelation, and the Church, ever ready to restrain sin, was especially prompt in regulating all matters which might lead to carnal sins. The result was an elaborate system, which as greatly astonishes by its scientific acumen and casuistic skill as it repels by its extreme particularity. The system is divided



into three great heads: (1) the nature and effect of marriage; (2) the nature and effect of the act whereby the marriage is created; and (3) the impediments to marriage.

(1) The Canon Law knows nothing of the Roman idea of *manus*. In its eyes, the wife and the husband stand upon equal terms, and their duties and rights are reciprocal. The influence of Roman Law may be observed to a slight degree, but the Scriptural principle of the union of the persons, and of the indissolubility of that union, are in the forefront of the canonical conception. This was emphasized because of the type of the union between Christ and the Church which was seen in the marriage relation.<sup>1</sup> Marriage was, therefore, a status, and in no real sense a contract, whatever the act by which the bond was created. Should there exist a gross violation of the rights of either partner in the marital relation, there would therefore be no ground for dissolution of the bond, permitting either party to remarry; that is to say, there could be no divorce *a vinculo*; but there might be a legal separation, a divorce *a mensa et thoro*. The marriage bond would still remain intact, and neither party, no matter how innocent of wrong, could remarry until freed by the death of the other. But the prohibition of divorce did not preclude the dissolution of a relation which was, as a marriage, legally void from the beginning on account of some defect in the act by which the marriage relation was to be established, or because of some other existing impediment.

(2) The act whereby the marriage relation was established consisted of the free consent of the contracting parties. They must be of an age competent to make the contract. This age was fixed for males at the age of fourteen, and for females at twelve. Marriages contracted at an earlier age than those given could be annulled when the younger of the two reached the age of consent. The

<sup>1</sup> Ephes. v. 32.

consent must be expressed in words which denoted the immediate entrance upon the marital relation, *verba de praesenti* or *sponsalia de praesenti*. But *verba de futuro* with subsequent *copula carnalis* were of the same force. The validity of the marriage was in no respect dependent upon the presence of any specified person, though it was proper to contract marriage in the presence of the local parish priest. The importance of the witness was merely to establish the fact of the marriage. Since the consent must be a real consent, it must be given by a person capable of understanding the nature of the act in which he was engaged. He must be subject to no deception or fraud as to the person with whom he was contracting marriage, and he must not be acting under fear or compulsion. Otherwise the marriage was invalid, though such defects in consent might be cured by voluntary continuance of the relation after the invalidating circumstance was known or removed; that is to say, a full and free consent was presumed.

(3) Certain persons were not capable of contracting marriage, or were incapable of contracting marriage with each other. There were impediments to their union, either with any person whatever, or with certain persons. These impediments might be either prohibitive or diriment. In case of the former, the union was forbidden, and to contract it was a sin. Such a marriage could be annulled; it could also be validated. In the case of the latter, there was no marriage. Defects in consent were classed as diriment impediments, and with them was classed the impediment of impotency, which was carefully defined. The other diriment impediments were based upon (1) consanguinity and affinity, (2) a relationship forbidding a marriage, such as an existing valid marriage with a third person, or as religious vows of celibacy, (3) difference in faith, as between a baptized person, or Christian, and an unbaptized person, or heathen, and (4) a sin or crime, as adultery.

\* Of these, the law concerning consanguinity has left its impress upon all modern legislation. It was very elaborately developed. Its basis was in Holy Scripture, but the simple statements of Leviticus (chap. 18) and Deuteronomy (chap. 27) were greatly extended. The first important principle extending the Biblical prohibitions was that, in consequence of the unity of the married partners, the wife's blood relations, or *consanguinei*, were in the same degree related to the husband by affinity as to her by consanguinity, and *vice versa*. This was later carried still further, and the wife's *affines* were likewise related to the husband, and *vice versa*. Thus ensued an affinity of the second order (*affinitas secundi generis*). Even an *affinitas tertii generis* was created; but all these relationships were abolished by Innocent III, who established the modern principle that the wife's *affines* on her own side are in no wise related to the husband, and *vice versa*. It should be noted that affinity was established not merely by marriage, but by the *copula carnalis*. Hence arose an *affinitas illegitima*. This became a part of English law and in theory is still in force.<sup>1</sup> The idea of consanguinity was extended to several analogous relationships, such as the spiritual relation induced by assuming the position of sponsor, or godparent, in baptism.

There is no part of modern law so intimately connected with the Canon Law as is that relating to marriage. This statement holds good of all countries in which the Christian Church has been under the authority of the See of Rome. In the English-speaking countries, with a few exceptions, the common law of marriage is directly derived from the Canon Law. The modifications of the latter have been effected through curtailments of its excessive refinements. In spite of the many statutory changes which have been introduced in the past century, the Canon Law is the basis of the French, German, and Italian law of mar-

<sup>1</sup> Cf. Archbishop Parker's Admonition of 1563.



riage. In the Spanish and Portuguese countries of Europe and America, the influence of the Canon Law has been but little diminished by the modern revolutionary movements. Even in Protestant countries, the modifications made in the Canon Law are far less than might have been expected.

#### SECTION V.—RECEPTION OF THE CANON LAW

It has been pointed out that the boundaries between the civil and ecclesiastical authorities never became permanently fixed. The sovereign stood in a twofold relation to the Church. He was at once a member of her body, and the head of a nation. As the former, he was bound by the laws of the Church. As the latter, he was often brought into unavoidable conflict with the ecclesiastical authority. This held true of probably every European country. It is a surprising instance of the difficulty of reconciling the two authorities and defining the limitations of the Church that in Spain, which has always retained the characteristics of a Catholic State, the sovereigns have exercised an almost absolute power that has constantly disregarded or overridden the ecclesiastical laws.<sup>1</sup>

The most important compromises, or adjustments of claims, which were made in the Middle Ages were those concordats which arose from the contests connected with the union, in the case of bishops, of political authority and ecclesiastical dignity. With these contests the name of Hildebrand is forever associated. These concordats were similar to treaties. Each party bound himself to observe certain limitations, and permitted the other to enjoy certain rights which he had claimed. The first concordat may be said to have been that of Worms, 1122 A.D., concluded between Calixtus II and Henry V. By this, the rights of the Church to the free election of bishops, and the rights of the State to feudal investiture, were preserved by being separated. Other concordats were:

<sup>1</sup> See Schulte, *Kirchenrecht*, § 23, par. VII.

that of Constance, in 1418, between Martin V and the German nation; that of Frankfort, in 1447, between Eugene IV and the Empire; and the Vienna Concordat of 1448, which was founded upon that of Constance and remained in force until the end of the Empire in 1806. Martin V attempted to make at Constance a concordat with France similar to that with Germany, but was unsuccessful. In 1516, however, Leo X and Francis I succeeded in arranging a concordat. The substance of all these concordats, founded upon the agreement of Constance, was, in general, a compromise as to the number and qualifications of the cardinals, the appointment to benefices and churches, the qualifications of incumbents, the privileges of dignitaries, the force of the decisions of the Roman Curia, simony, excommunication, and indulgences, as well as the various forms of church income, such as annates.<sup>1</sup> By a concordat the law of the Church, that is, the Canon Law, was to a certain degree modified and limited in its extension. On the other hand, by this means that law became a part of the law of the land. But by the compromise the position of the law, as binding because of intrinsic force, became seriously endangered, and the way was in part paved for the coming of the modern concordats, which are radically different in their spirit from the older ones.

From abundant data it can readily be proved that the Canon Law was never wholly in force throughout Europe, although it was regarded in ecclesiastical courts, and by theologians generally, as binding *proprio vigore*. The position held by the Canon Law in England may be taken as an illustration of the many limitations to which it was subject. This is, however, only an illustration; for in no two countries of Europe was the position of the Canon Law the same.

<sup>1</sup> Cf. Hübler, *Die Konstanzer Reformation und die Concordate von 1418*. Leipzig, 1867.

The extent of the jurisdiction of the Church courts fluctuated in England as elsewhere. In the period preceding the Norman Conquest, the bishop sat in the shire-moot in conjunction with a civil official. In the hundred-moot the ecclesiastical and civil officials also sat together. Nearly all the civil cases were brought before them, and by both classes of officials the law was expounded according to the laws of Edgar and Canute. But even in Anglo-Saxon times the distinction between the two classes of courts was recognized.<sup>1</sup> Here, as elsewhere, the most important ecclesiastical cases were dealt with in synods. The bishops exercised disciplinary authority over their inferior clergy. Disputes between members of the clergy were tried before ecclesiastical tribunals. ✓ Whether the *privilegium fori*, or the exemption of the clergy from the jurisdiction of a secular tribunal, was allowed is, however, uncertain. In all matters connected with penance, the Church exercised authority ✓ over both laymen and clergymen, the penance being imposed *pro salute animæ*.

The foundation of the exclusive competence of ecclesiastical courts was earlier than the period of William the Conqueror; but the complete separation of the civil from the ecclesiastical courts was accomplished by that monarch. Everything which pertained to the cure of souls (*quæ ad regimen animarum pertinent*) was to be tried in the courts of the Church. The civil authority was to uphold and enforce the rulings of the ecclesiastical courts. The law of these courts was not yet the Canon Law, as that term came to be understood, but a mass of law which had grown up in England, composed of the canons of local synods, papal decretals, and canons of synods held in various parts of Christendom and accepted in England. These had

<sup>1</sup> Cf. Schmid, *Gesetze der Angelsachsen*, 2d. ed., App. II. "If a priest refers to laymen a judgment which he ought to refer to consecrated persons, let him pay twenty pieces."



been brought together in some order; but this period was before the date of the epoch-making work of Gratian and the revival of legal studies in Italy. In all this, the state of the law in England differed little from its state elsewhere.

The jurisdiction of the ecclesiastical courts, as to the persons amenable to these tribunals and the causes which were to be tried in them, was limited. The persistent claim of the Church was that ecclesiastical persons could not be tried by any secular court, but only by ecclesiastical or spiritual courts. This claim was admitted by Stephen's charter of 1136.<sup>1</sup> The privilege was revoked by Henry II. Clerks, however, still enjoyed to a large degree immunity from secular courts, and the publication of the *Decretum* of Gratian was powerful in strengthening this immunity.<sup>2</sup> The Constitutions of Clarendon required all clerks to answer in the king's court for criminal complaints, and afterward to be tried in the ecclesiastical courts; but by the concordat of 1176, concluded between Henry II and the legate Hugo, the clerk was obliged to appear first in the secular court only in cases involving some breach of the forest laws or of some service due to the king or to any other temporal lord. The condemned clerk was, however, after conviction in the ecclesiastical court, handed over to the secular tribunal for punishment, which might be neither death nor mutilation. The principle that immunity was a right of the clergy was established by these regulations.

When the right of immunity was extended to all who could read, the importance thereof was diminished, and during the reign of Henry VII a reaction set in.<sup>3</sup> Clerks

<sup>1</sup> *Ecclesiasticarum personarum et omnium clericorum et rerum eorum justitiam et potestatem et distributionem bonorum ecclesiasticorum in manu episcoporum esse perhibeo et confirmo.*

<sup>2</sup> Cf. Makower, *Constitutional History of the Church of England*, London, 1895, p. 400.

<sup>3</sup> Cf. 4 Hen. VII, c. 13; 7 Hen. VII, c. 1; and 12 Hen. VII, c. 7.

could not more than once claim benefit of clergy if of lower rank than subdeacon, that is, in the minor orders of ostiarius, lector, exorcist, and acolyte, — orders which had given immunity but had not entailed celibacy, and which are now merely preliminary grades to the priesthood. In order to prevent the claim being twice made, the clerk who had been condemned in a secular court, before being handed over to the ecclesiastical court, was branded on the thumb. The custom of branding was retained when benefit of clergy was extended, after the Reformation, even to women who could read.

The ecclesiastical courts claimed cognizance in a vast number of causes in which not only ecclesiastics, but laymen, were involved. Two general classes of causes, those concerning marriage and testaments, were with little opposition conceded to the Church courts. It should be noted that the law applied by these courts had no connection with the law of the land. This is illustrated by the Incident at Merton in 1236.<sup>1</sup> By the law of the Church, children born out of wedlock were legitimated by the subsequent marriage of their parents. Although there had probably been some recognition of this principle in the earlier English law, to the extent that if the children were recognized by their parents at the time of their marriage the said children were regarded as legitimate, yet the feudal practice, from the middle of the sixteenth century, had been opposed to any after-legitimation, even by formal recognition. This practice had become the Common Law of England on the subject. Questions of bastardy were so closely connected with those of marriage that the Church claimed cognizance of all such cases, and its courts refused to pronounce a child illegitimate if its parents married after its birth. Thus the two courts at once came into conflict. In 1234 an attempt was made to compromise the matter, by an agreement to refer to the

<sup>1</sup> 20 Hen. III.

ecclesiastical court the question of fact as to whether the child was born before or after the marriage of its parents. But the bishops continued to urge the full claims of the Church, and the matter finally came to a head at the Council of Merton. The bishops stood as a unit by the law of the Church. The lay barons stood as a unit by the Common Law. The result was that the Church courts continued to abide by their own decisions, and the secular courts by theirs. No illegitimate man could be ordained; his legitimacy was decided by papal law. No illegitimate man could inherit land from his father; his legitimacy was decided by Common Law. But as to the fact of marriage, the Common Law had nothing to say. Marriage was a sacrament of Holy Church.

The principal causes which were, with any success, claimed for the ecclesiastical jurisdiction were as follows:<sup>1</sup>—

(1) Matrimonial causes of every sort. This claim was admitted as a matter of course throughout the pre-Reformation period.

(2) Questions of legitimation and bastardy. This claim was admitted in the early Norman period;<sup>2</sup> but if the law of the land was contravened in the decision a prohibition was issued by the civil court.

(3) Dower was in many cases recovered in the ecclesiastical courts. If the case turned on the validity of the marriage, the plea was considered by the Church as coming under its jurisdiction in matrimonial causes.

(4) Testamentary causes fell to the care of the Church. From the time of Glanvill, this claim was practically undisputed. This valuable prerogative of the Church was not universally recognized in Europe.

(5) Administration of the estates of persons dying intestate.

(6) Suits in regard to certain tithes.

<sup>1</sup> Makower, *op. cit.*, p. 420 ff.

<sup>2</sup> Cf. Glanvill, Bk. VII, c. 13 ff.



(7) Disputes touching customary dues to parish priests. Such were corodies, or a right to meat, drink, clothing, shelter, and, in general, sustenance.

(8) Actions upon contracts confirmed by an oath were strenuously claimed by the Church. In Normandy the claim was successful; but in England ecclesiastical jurisdiction in these matters was denied by the Constitutions of Clarendon. The claim of the Church was based upon the fact that any violation of such a contract involved a violation of the oath, and was construable as a species of perjury. As to this sin of perjury, the Church retained, in connection with its right of inflicting penance *pro salute animæ*, a certain cognizance,<sup>1</sup> and the ecclesiastical courts, like courts in all ages, were nothing loth to extend their jurisdiction.

The most important conflict between the civil and ecclesiastical jurisdictions, in England as elsewhere, was the right of presentation to vacant benefices. This was a matter which naturally fell to the Church, as the presentation to a benefice was most intimately connected with the spiritual administration of the diocese. The responsibility for the spiritual welfare of the souls of whom he was chief pastor involved for the pope the right of determining the persons who should in any particular place have the cure of souls. For this reason, the whole matter was elaborately treated in the Canon Law. On the other hand, the right of presentation, or *advowson*, was a valuable property right. Many parishes were endowed by pious persons, with the distinct provision that certain acts should be performed for the benefit of the soul of the founder. The royal courts claimed exclusive jurisdiction in all matters of *advowson*, and this claim was throughout consistently maintained. It was only in the bare matter of presentation that the civil courts interfered by a prohibition and claimed cognizance. The bishop, however,

<sup>1</sup> See Maitland, *op. cit.*, *passim*.

retained a certain control in the matter by the right of deciding as to the fitness of the presentee,<sup>1</sup> and as to the fact whether the benefice was actually vacant.<sup>2</sup> These were matters which could be settled only by Canon Law.

It was mainly because of the discussions and disputes as to the right of advowson that the various Statutes of Provisors<sup>3</sup> were adopted. By these, the pope was not allowed to deprive patrons of the exercise of their rights of advowson, or the chapters of their rights, according to Canon Law, in episcopal elections. The papal practice was positively detrimental to the best interests of the Church in England, for thereby vast amounts of money which should have been devoted to pious purposes within the country were diverted, and many who were in the enjoyment of benefices were non-residents. The whole history of these statutes was that of one long series of evasions of the letter of the law on the part of the king, "a compromise between the statute law and the religious obedience which was thought due the Apostolic See: by regarding the transgression of the law merely as an infraction of the royal right of patronage, to be condoned by the royal license, the royal administration virtually conceded all that the popes demanded; the persons promoted by the popes renounced all words prejudicial to the royal authority which occurred in the bulls of appointment; and when the king wished to promote a servant he availed himself of the papal machinery to evade the rights of the cathedral chapters."<sup>4</sup>

The Præmunire Statutes, and especially the great Statute of Præmunire,<sup>5</sup> were likewise aimed at the danger to the right of advowson through the claim of the pope to appoint

<sup>1</sup> Cf. Glanvill, XIII, c. 20.

<sup>2</sup> Cf. Bracton, IV, tract 2, c. 3, § 1.

<sup>3</sup> 25 Edw. III, st. 6; 38 Edw. III, st. 1, c. 4, and st. 2, c. 1-4, and 13 Rich. II, st. 2, c. 2.

<sup>4</sup> Stubbs, *Constitutional History of England*, § 291.

<sup>5</sup> 16 Rich. II, c. 5.

to benefices. In these statutes, the danger was met in a manner different from that used in the Statutes of Provisors. The first of the Præmunire Statutes was known as "a statute against annullers of judgments of the king's courts."<sup>1</sup> The great Statute of Præmunire denounced forfeiture of goods and of the king's protection against all those who should introduce papal bulls, or other instruments, which attacked any royal prerogative. The gist of these statutes is that no appeal could be made to the pope in any matter which by the law of England belonged to the civil jurisdiction. The judgment of the civil court must stand. In matters belonging to ecclesiastical jurisdiction, and so acknowledged by the civil authority, appeal to the pope was a matter of course, and so continued until the Statute for Restraint of Appeals of Henry VIII. But in the case of the Statutes of Præmunire, as well as that of the Statutes of Provisors, enforcement was by no means consistent. Exceptions were constantly made.

The Church retained a large jurisdiction in matters which were not of mixed nature, but were purely spiritual. Heresy, as well as offences against sexual morality, were tried by the ecclesiastical courts. The secular arm executed the sentence of the ecclesiastical court, as in the burning of the obstinate heretic.<sup>2</sup> Cases of sacrilege were to be tried both in the ecclesiastical courts, as sacrilege, and in the civil courts, as breaches of the peace.<sup>3</sup> Neglect to support the Church, as in maintaining the fabric of the Church, was likewise a matter for the spiritual courts, as were simony and usury.

It will readily be seen that a jurisdiction of such wide extent and influence would be so closely interwoven with

<sup>1</sup> Sometimes, but erroneously, called *Statutum de Provisoribus*. Cf. *Statutes of the Realm*, I.

<sup>2</sup> Cf. 2 Hen. IV., c. 15.

<sup>3</sup> Cf. Reeves, *History of English Law*, c. 25; also 3 Edw. IV.



the life of the people and the whole social system that it could not easily be abolished, even after the papal authority had been set aside by the Reformation. The chief legal effect of the breach with Rome was brought about by the Act of 24 Hen. VIII, c. 12, entitled, "An Act that the Appeals in such cases as have been used to be pursued to the See of Rome shall not be from henceforth had nor used but within this Realm." The ecclesiastical legal system thus became autonomous. The authority of the Canon Law was also endangered by the Act which renounced the authority on which that law had been accepted. The answer to this difficulty was found in the fiction, retained in the English Law, as to the authority of the Canon Law in England. This fiction is, in substance, that the Canon Law has no force *proprio vigore*, but only by acceptance, that which has been accepted being binding only as far as, and because, it was accepted. In addition to this there was the opinion that the decisions of local councils had force apart from and a certain authority above the Canon Law. The position which the law would have held, if it had been dependent upon the very meagre provincial canons, is shown by the great work of Lyndwood, who arranged these canons in five books under the form of the Decretals, and provided them with a gloss.<sup>1</sup>

This theory of the origin and authority of the Canon Law in England was officially recognized by the statutes of Henry VIII. A statute was passed in 1533<sup>2</sup> by which a commission, consisting of thirty-two members, sixteen from the clergy and sixteen from the laity, was to be appointed to revise the ecclesiastical laws of the Church in England. This statute was based upon the assumption that the various ecclesiastical laws had been enacted. "Where divers constitutions, ordinances, and canons provincial and synodal, which heretofore have been enacted, be thought

<sup>1</sup> v. Maitland, *Roman Canon Law in the Church of England*, 1898, c. I.

<sup>2</sup> 25 Hen. VIII, c. 19.

not only to be much prejudicial to the King's prerogative royal, and repugnant to the laws and statutes of this realm," etc. Much the same language is used in the proviso "that such canons, constitutions, ordinances, and synodals provincial, being already made, which shall not be contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the King's prerogative royal, shall now still be used and executed, as they were afore the making of this Act, till such time as they be viewed, searched," etc. Nothing came of this proposal. By 27 Hen. VIII, c. 15, the power of the king to appoint a commission was extended for three years after the dissolution of the Parliament then sitting. But 35 Hen. VIII, c. 16, gave the king for life the power to appoint the commission, and also regulated more particularly the standing of the Canon Law. The fiction of the English origin of the ecclesiastical law was maintained only in part; and in truth the local synodal legislation had been too trivial to impose upon any one. Accordingly, until the revision had taken place, "such canons, constitutions, ordinances synodal or provincial, and other ecclesiastical or jurisdictions spiritual, as yet be accustomed or used here in the Church of England, which necessarily and conveniently are requisite to be put in ure and execution for the time, not being repugnant, contrariant, or derogatory to the laws or statutes of the realm, nor to the prerogatives of the regal crown of the same, or any of them, shall be occupied, exercised, and put in ure for the time within the realm," etc. Here is the ground for the continuation of the Canon Law.

The revisory commission was finally appointed; a report, entitled *Reformatio Legum*, was drawn up. But the report was never acted upon. The old law remained in force. But no point of the ecclesiastical law might conflict with parliamentary law. The statutes of the realm, immediately upon enactment, repealed each and every

ecclesiastical law which was opposed to their provisions. Thus, a number of provisions were enacted as to the degrees within which marriage might not be contracted, and also as to the impediment of a previous marriage, contracted but not consummated. As long as these enactments stood upon the statute book, the Canon Law on those points was in abeyance. But the great principles of that law remained for the most part unaltered for two centuries. Lord Hardwicke's Act, the Marriage Act, and others since the beginning of the reign of George II, have not a little modified the Canon Law; and the important changes made in the judicial system of England, whereby ecclesiastical jurisdiction in matrimonial and testamentary causes has been completely set aside, have little less than revolutionized the whole order. In all this, statute law has, as it were, replaced the corresponding portions of the Canon Law. Nevertheless, much which might be regarded as the common law of marriage and testaments has remained to a large degree unchanged.

The Common Law of England became also the Common Law of her colonists. In matrimonial and testamentary causes, this remained almost unchanged by any English legislation. The operation of the great Acts regulating marriage were for the most part restricted to England; this was certainly the case with Lord Hardwicke's Act, the only important or far-reaching Act on the subject prior to the separation of the American Colonies. In this way, the Canon Law lies at the base of much American law. It is, however, hardly necessary to say that its authority in the United States is due solely to the fact that it has been accepted by the courts or embodied in statutes.

✓ The position of the Canon Law in the various countries of Europe has been altered in many ways and by many events. As has been said, it is probable that the whole body of the law was nowhere in complete operation. But



whatever position it once held was in many places changed by the tremendous revolution in thought and politics which took place at the time of the Protestant Reformation. In Germany, no less than in England, the Reformation was in large degree a matter of nationality—a social force which has always been opposed to the imperialistic spirit of the Church. In Germany, even more than in England, the secular authority came to the front. There was a complete breakdown of the hierarchical system. Large portions of the Canon Law were thereby annulled. With the loss of the hierarchical system—and with it, of necessity, the ecclesiastical judiciary—the Canon Law was to a large extent abandoned. It did not, as in England, remain as a body of law which was to be in force until, from the new order of things, a new law should be evolved after several centuries. The secular authorities assumed the direction of ecclesiastical matters, and they did not show that respect for venerable forms which, in spite of the display of actual violence, characterized the English Reformation. The Canon Law remained in force only to a very small degree. Men's minds had been trained in it as a legal system, and through this it retained some power to mould subsequent legislation. Attempts have been made by some legal writers to trace the prevailing Protestant ecclesiastical law in Germany to the Canon Law. Notable among these writers was Justus Henning Böhmer.<sup>1</sup>

The Counter-Reformation won back to the Catholic Church much of the ground which had been lost, and at the same time restored the Canon Law as it had been modified by the Council of Trent. These modifications, of course, came into force as a part of the general body of law only in those countries in which the authority of the

<sup>1</sup> *Jus ecclesiasticum Protestantium, usum hodiernum juris canonici juxta seriem Decretalium ostendens*. 5 Vols., Halle, 1714 sqq. This work is an attempt to arrange Protestant law according to a system which is based upon fundamentally different principles.

Council was recognized. Elsewhere, the Roman Church was practically non-existent, and the Canon Law, so far as it was allowed to remain at all, retained its earlier form.

The decay of the administrative vigor of the Roman Church, and its continued usurpations of secular authority, rendered it powerless to resist the effect of the second great upheaval of the social order and the second great blow at the authority of the Canon Law,—the French Revolution. The new codes which were introduced in various countries after the Revolution, and the constitutional changes which took place, moved steadily in the direction of greater secularization of all matters not purely spiritual. This has been the case in both Protestant and Catholic countries; but it is doubtful whether the State-Church principle, and the dominance of the State in ecclesiastical matters, are as far-reaching in the former countries as in the latter.

The relations between the various countries and the head of the Catholic Church are regulated by concordats. By these stands or falls the recognition by the State of the laws of the Church as a Church. In some countries, the state courts recognize the laws of the Church in the same way as they recognize the laws of any private society or corporation. This is not the case in the older countries. In these, the State has nearly always claimed certain rights in the control of Church matters, such as the appointment to a bishopric. Probably the matters of matrimony are everywhere regulated by the State, either by obligatory civil ceremony or by religious ceremony according to certain civil regulations. In those countries in which the position of the Roman Church is regulated by concordats, the State cedes the Church the administration of certain semi-ecclesiastical functions, and on the other hand the Church gives the State the right to interfere with the ecclesiastical administration. The theory upon which the concordats have been made is that the local Church is

represented by the universal bishop, the pope, and the State by its sovereign authority. The sovereign enters into the compact purely as the representative of the State. As an individual, he owes complete obedience to the Church. Any reference of a concordat to a legislature or council for ratification is entirely a matter of the constitutional requirements of the particular country. It is the opinion of the Roman Curia that the State is unconditionally bound by the terms of the concordat.<sup>1</sup> On the other hand, it holds that the Church is not so bound, as the concordat is granted by the Church as a privilege, not as a right. The concordat by its terms becomes a part of the law of the State, and is a special law applied to definite persons and things, having nothing to do with other confessions than the Roman. It may be questioned whether, on the whole, the concordats, ancient or modern, have been a greater gain to the Roman Church than has the relation behind State and Church held in English-speaking countries and those other lands where the Church enjoys toleration.

<sup>1</sup> Cf. *Syllabus* of Pius IX, No. 43.



## CHAPTER XIII

### BARBARIAN CODES

#### SECTION I. — THE BARBARIAN INVASIONS

THE thesis of the historical school of jurisprudence, that law is the expression of the will of a people rather than of a ruler, and that it is closely connected with all the elements of culture which a people possesses, finds abundant proof in the history of the Roman Law immediately after the fall of the Roman Empire in the West. According to the traditional view, the Roman jurisprudence disappeared with the fall of the Western Roman Empire in 476, and emerged from obscurity, as far as the West was concerned, with the discovery at Amalfi of Justinian's Digest, in the earlier part of the twelfth century. Nothing could be further from the truth. The destruction and annihilation of Roman Law would have been possible only by the extirpation of the Roman people and Roman civilization. The barbarian invaders were unable, even had they so desired, to effect such complete havoc. The Roman Law still lingered on. Its strength and purity were diminished; but it was on a level with the culture which had survived the long process of decay—a decay which had been in progress for more than two hundred years before the Empire of the West came to an end. The new forms which that law assumed, the combinations into which it entered, were exactly proportioned to the position assumed by Roman culture in the new society which arose on the ruins of the Empire.

The melodramatic descriptions which have been given

of the fate of the Roman Law and Empire have been based upon the false assumptions that the law of a nation varies exactly as vary the political institutions under which the people live; that the downfall of an empire is the end of a race, a people; and that the erection of a new kingdom or dynasty implies the creation of an entirely new legal system. These assumptions might have been correct in the case of the barbarian invasions of the Roman Empire and the creation of new kingdoms, if the policy of the barbarians had been the extermination of the inhabitants and the total destruction of that which chiefly made advantageous the possession of the country. In spite of all the vicissitudes which had fallen upon the Roman Empire, and the impoverishment of all the provinces, as well as of Italy, there remained throughout the West innumerable institutions which were the centres of Roman influence and especially of Roman Law. These were the municipalities and colonies which, according to the policy of the imperial government, had everywhere been founded. Notwithstanding the decay of the central administration, these municipalities retained their semi-independent existence, and they remained intact despite the ever-changing forms of power.

The municipal government had within its constitution the germs of independent existence, inasmuch as the magistrate or governor always had two functions. He represented the imperial authority, and was at the same time — in a limited way — dispenser of justice between the citizens. His court was a court of first instance, whence appeal might be taken to the provincial governor. In almost all towns, therefore, there was a local judiciary administering the Roman Law, and after the middle of the fourth century there was in many towns a special magistrate, *defensor*, elected by the people; this magistrate filled the office of judge. In other towns, different officials administered justice. When the central authority decayed,

there still remained, therefore, a local authority which, though it might be unable to withstand the barbarian invaders, still maintained the customs and institutions of the past. This local authority was moreover adapted to perpetuate itself.

The whole body of citizens had been divided into four classes: senators, *curiales*, plebeians, and slaves. The senators were probably connected with the families of those who had formerly belonged to the Roman Senate. They enjoyed special honors and immunities. The *curiales* formed the most important class from the historical point of view. The *curia* which they formed was the town council. It was not an elective body, but included all who had a certain amount of property, twenty-five acres and upward. The *curia* selected the magistrate, and was to a certain extent responsible for his administration. Had it not been for the imperial despotism, which rendered impotent every form of local government, such a community would have been almost free. With the weakening of the central authority, it became proportionately powerful.

The new factor in the development of jurisprudence during the fifth and sixth centuries was the Germanic element introduced into the life of the effete provinces of the Empire by the barbarian tribes which invaded Gaul, Italy, and Spain. What was that Germanic element? In what respect did it differ from the Roman? The answer to these questions is apparent in the changes made in the nature of the law.

The Germanic legal organization, as far as it has been revealed by the reports of the classical writers or preserved in the laws, customs, and traditions of the race, was primitive. It was to a large extent the organization which has been common to all barbarous nations at some period of their evolution. The marked contrasts which have been often pointed out as existing between the Roman jurisprudence and the rough system prevailing among the



Franks and Goths are those which always exist between an advanced and highly developed jurisprudence and its rude beginnings. The Roman Law at one time had had many features which are regarded as especially characteristic of Teutonic law. The Romans passed through the same stages of development as those through which the Germans were passing at the time of the invasion.

It is impossible to say to what extent the German tribes were influenced by the Roman Law before they entered Roman territory as conquerors. The policy of the Roman Empire had been to induce the barbarians upon its borders to adopt Roman customs and laws. It even tried to persuade them to submit their quarrels to Roman arbitration. The attempt met with little success. Many of the barbarians bitterly resented this policy as a pretext to rob them of their liberty. On the other hand, not a few barbarian chiefs had become officials of the Empire, at least in title, and among them there must have existed some familiarity with the general ideas of the scientific law of the Romans.

In each tribe the whole body of the people were divided into three classes: the free, the *lætes*, and the slaves. Not until just before the great migrations was there in the community any hereditary nobility as a distinctive class. Within the tribe, the *sippe* made up a group resembling the Roman *gens*. It was composed of those related by blood. There was not, however, the same extraordinary development of the *patria potestas* as among the Romans, and the adult male stood in immediate relation to the *sippe*, or *gens*. The *sippe* received the weregeld if any of its members were killed, and in case of a lawsuit the *sippe* assisted as compurgators. As with the Roman *gens*, the *sippe* was of great importance in connection with the guardianship of children and the protection of widows.

The law was the law of barbarians. It was customary law. However closely the various tribes may have origi-

nally been related, and however common was the foundation of their laws, these varied with the different tribes. The freeman of a tribe knew the law of his own tribe through personal participation in the gatherings of the freemen. That law was to a large extent expressed in rhymes and proverbs. The law belonged only to the tribe and to its members; the member of another tribe was without the law. This was the case with nearly all early races; it was the basis of the distinction between the *jus Quiritium* and the *jus gentium* of Rome.

Tribes so imperfectly developed socially and politically were without the need of a highly developed legal system. Private ownership of land did not prevail; land was divided by lot and frequently changed hands. There was therefore no elaborate land law; the custom of the tribe regulated the division of land. In a society in which there was but little exchange of commodities and where the demands of commercial life were wholly unknown, there was no need of laws touching obligations, or of any of the other titles which fill so large a part of the code of a civilized nation. Law was concerned almost exclusively with crimes. In this, the law was based upon two ideas, the wrong or injury done the plaintiff, and the wrong done the peace of the community. But this distinction did not create two branches of the law. Complaint against the wrongdoer was made by the injured party or by his sippe. The injured could either revenge himself upon the guilty — *lex talionis* — or demand weregeld. If the claim for weregeld was allowed, there was generally a further sum to be paid by the defendant; this was a fine which went to the public treasury. In some cases weregeld was not allowed, and the culprit was either outlawed, when he might be killed by any one, or was put to death as a sacrifice to the gods.

The whole conception of an offence was very crude and primitive. An attempt to commit a crime was not

criminal if no actual injury had been inflicted. Furthermore, an accidental injury was punishable by the payment of wergeld, but the fine to the public treasury was not inflicted. The punishments and amount of damages imposed in the various classes of offences were essentially those of a barbarous state of society.

The barbarian invasions which took place at the time of the fall of the Roman Empire were, as a rule, made by comparatively small bodies of warriors. There were usually only a few thousands of men, under the leadership of some daring chief, and the enormous success which attended these incursions was due less to the numbers of the invaders than to their strength and courage and the weakness of the Romans. Thus the army of Clovis, the most successful of all the invaders, was composed of not more than six thousand soldiers, and the whole nation of the Burgundians did not number sixty thousand. There was therefore need of an organization entirely different from that which would have been called for if the invaders had been numerically equal to the original inhabitants, or able to dispossess them. The nature of the invasions was at first little more than that of forays. There was no definite plan, further than that of a raid into the rich and fertile lands which lay undefended to their incursions. The country was ravaged for a space; booty was gathered from some towns, ransom extorted from others; then, laden with spoil, the invaders retired whence they came. Later, they remained in the country and made permanent settlements. But they were neither sufficiently numerous to cultivate the land which they had obtained by force, nor so barbarous as not to appreciate to some extent the civilization of the country of which they had become masters, and the fusion of the conqueror with the conquered was the natural result. The power remained with the barbarians; but the civilization of the conquered was destined to disarm the conquerors.



One cause of the success of the invasions and of the ready acquiescence of the conquered in the new order of things was the unsettled condition in which the latter had for long been living. For centuries the imperial power had been the goal toward which a multitude of adventurers had struggled, with varying success. There existed in the people no sense of personal loyalty to any head or ruler. The actual authority was a matter of little moment when the Empire had been repeatedly divided and again united; at times ruled by an usurper — so called merely because he was unable to retain his crown — and again by an emperor whose only relation to the local government was the extortion of taxes wrung from a long-suffering populace. The barbarian hordes which had repeatedly ravaged the country had rendered dangerous, if not impossible, all commerce between the different parts of the provinces and the Empire. The inhabitants of the outlying districts were the first to suffer from the pillagers, and the security in which alone agriculture is possible was utterly destroyed. Not only the actual invasions, but even the fear of sudden inroads, was enough to paralyze effort. In the towns the effect was hardly less disastrous. Starvation and ruin were the natural effects of a ruined agricultural interest; and although the city walls might for a time defend the inhabitants from peril of the sword, the foundations of the wealth by means of which alone urban life was tolerable or possible were destroyed. There was therefore a certain relief to the existing conditions when the invaders, instead of treating the country as a prey, settled within it and by their presence rendered fresh inroads unlikely.

The amalgamation of the various races was a slow process. The demands of the barbarians were sometimes unwarrantable, and were fiercely, though impotently, resented by the conquered. The confusion which was the result of the invasions was a chaos which contained the

germs of a new order which, even in its first rude forms, did much by the establishment of a firm government which strove to administer justice and which certainly defended the governed.

The number of tribes that invaded Gaul, Italy, and Spain was great, but for the purposes of legal history only five need to be considered: the Ostrogoths, the Visigoths, the Burgundians, the Franks, and the Lombards. Of these, the first to establish themselves in their new homes were the Burgundians, who arrived in Gaul between 406 and 413, and who occupied the country between the Jura, the Saône, and the Durance, with Lyons as a capital. The Visigoths, at their coming between 412 and 450, settled in the country between the Loire, the Rhone, and the Pyrenees, with Toulouse as their capital; later they extended their conquests into Spain. The Franks were the last to arrive in Gaul. They entered Gaul between 481 and 500, and occupied the land between the Rhine and the Loire, north of the line between Strasburg and Orleans, with Paris and Soissons as capitals. Of these three tribes, the Visigoths and the Burgundians had lived within the bounds of the Roman Empire, were Christians, and were acquainted with Roman civilization. They had also developed a distinct and individual culture of their own; contact with Roman life had stimulated their natural characteristics. The Franks were far more barbarous, and were still heathen. Their degree of civilization, as shown in the Lex Salica, clearly proves them to have been unacquainted with Roman culture. They soon overran the country. In 534 they took possession of that territory hitherto occupied by the Burgundians, and before 550 they had seized nearly all the kingdom of the Visigoths which lay north of the Pyrenees. Their kingdom included nearly the whole of Gaul.

The Ostrogoths invaded Italy in 489 and in 493, and there established a kingdom under Theodoric. The Lom-

barbs invaded Italy in 568, and within a few years they had become masters of the whole peninsula, except the sea-coast towns and a few minor cities.

The effect of the invasions upon the barbarians themselves varied according to their condition before the incursion. The change from the life of wandering tribes, inhabiting the wilds to the northeast of the Rhine, the Alps, and the Danube, to a settled life amid the Roman civilization of Gaul and Italy profoundly affected the character and customs of the conquerors. In their former existence, they had no need of any elaborate social organization; now they were compelled to adapt themselves to the conditions of a populous country which had come into their possession. In spite of decay and anarchy, in that country still survived the form of the ancient legal system. The administration of the newly acquired provinces compelled the invaders to adopt much of the old law; and the same admiration which they bestowed upon the remains of Roman grandeur, the baths, aqueducts, temples, and bridges, was not denied to the effective system of private law which had made these glories possible.

The invaders were by no means loth to recognize their obligations to the imperial system. In the past, they had been willing to accept titles which belonged to the Empire, and they were still under the influence of that tradition. Theodoric was content to be regarded as subordinate to the Eastern emperor, although the relations between the two rulers were at times extremely strained and even hostile. Theodoric had been consul in 484, and he had also enjoyed other titles and honors from the Empire. Even the barbarian Odovacar acknowledged the suzerainty of Zeno at Constantinople. Before his invasion, Alaric the Visigoth had received an office of importance in Illyricum, and had been "using the forms of Roman Law, the machinery of Roman taxation, the almost unbounded authority of a Roman provincial governor, to prepare the



weapon which was one day to pierce the heart of Rome herself."<sup>1</sup> But with the break-up of the Roman Empire and the passing of the tradition which had for centuries over-awed the Northern barbarians, passed also the secular authority of the Empire. The power of the Eastern Empire, which had been established by Justinian, was sufficient to maintain the tradition in the minds of ecclesiastics and the few who knew or cared for the literature of the past; but this was all. As successive waves of invasion flowed over the land, the marks which had survived many storms at last became obliterated, and the influence of the Roman imperial legal system almost disappears from the later barbarian codes.

The great influences which modified the barbarian native laws were three. There was the rise of a new conception of royalty, the establishment of a territorial aristocracy, and the consolidation of the Church. Thence there came about a twofold legal system, according to which the country was reorganized. There was the royal and aristocratic system, which was in the hands of the invaders; and there was the ecclesiastical system, which was in the hands of the Church. According to the former, the laws of the conquering race would be most prominent; according to the latter, the ecclesiastical and imperial laws.

Royalty, as it developed in the barbarian kingdoms, was very different from that which had existed in the primitive conditions of those races when they dwelt to the east of the Rhine. The society of that time has been described as democratic; but by that term was meant merely that the freeman took an active part in the affairs of the nation. The German king was surrounded by the Comitatus, a body of nobles by birth, whose presence was a continual check upon the royal power. There were also the freemen and the folkmote, or great council, in which the common affairs of the nation were discussed, and before which the

<sup>1</sup> Hodgkin, *Italy and her Invaders*, I, 259.

king was obliged to explain and defend his plans. The king himself did not receive his authority from descent, but from election; although the candidates for the kingly office were invariably selected from a royal family, which in heathen times claimed descent from the deities worshipped in the tribe. All this was changed by the migrations and the new conditions of life in which the people soon found themselves. In the settlement of the new lands the chiefs became proprietors of vast tracts. The small number of the invaders made it inadvisable for the followers of those chiefs to disperse over the land; and their habits of idleness, induced by the new conditions of life, were adverse to profitable employment of the rich territories which they had made their own. The commonalty lived with their chiefs. They accordingly fell into the position of mere retainers, and the authority of the chief became more and more absolute. The inequalities of rank and fortune became more marked, and the independence of the king became practically complete. The old forms were retained in part, but a new spirit dominated the political fabric. The kings, in their new position, aimed to reproduce the imperial system which had done so much for the stability of Roman society. They placed their dukes and counts in the various positions which the emperors had filled with consuls, *correctores*, and other officials. The fiscal system of the Empire, inadequate as it seems from a modern point of view, was a revelation to the invaders, and they even attempted to reproduce that also. "In a word, barbaric royalty, narrow and crude as it was, endeavored to develop itself, and fill, in some measure, the enormous frame of imperial royalty."<sup>1</sup>

The importance of the increase of royal power lay in the fact that only by such a concentration were rendered possible the codes which were issued. The gradual assimilation of Roman and barbarian law might have gone

<sup>1</sup> Guizot, *History of Civilization in France*, chap. VIII.

on for centuries; but the promulgation of a code would never have taken place but for the centralization of absolute power in the king.<sup>1</sup>

The second important legal fact in connection with the settlement of the barbarians within the Empire was the rise of a new form of aristocracy. The Comitatus gave place to the aristocracy of those ennobled by service. The land was, to a large extent, parcelled out among the inferior chiefs, on condition that they should render service to their king. The appointment of counts and other nobles to commands in the various towns and cities, and the honor and emoluments derived therefrom, tended to perpetuate the system of Roman Law as far as it had survived. The new rulers had no law by which to decide the multitude of questions upon which they were called to adjudicate. Their own system of law, even had it been applicable, could not satisfy the requirements of the cases brought before them by the citizens of the place they ruled. They were, therefore, compelled to employ the local law in the exercise of magisterial duties. In the semi-independent authority which was theirs by the terms on which they stood with their king, they were able to come into more immediate contact with the actual life of the people than would have been possible for the king himself; and their presence at the royal court was, in a certain sense, the bringing of the actual conditions of common life into immediate relation with the source of all authority and law.

The presence of the Christian Church and the influence of the hierarchy were fully as important. In the decadence of municipal organization the bishops rose into prominence. Their position had long since been assured by the favor of the emperors; and their authority, at first purely spiritual, was willingly admitted in secular matters by

<sup>1</sup> Cf. Dahn, *Die Könige der Germanen*, Leipzig, 1883, Vol. I, pp. 197-202, and Vol. IV, p. 1.



their Christian followers. Even in pagan times, the bishops had administered justice between the members of their flock, and their right to act as arbitrators was recognized by the Christian emperors.<sup>1</sup> The Western Church had risen upon the ruins of the Empire, and was yearly increasing in the perfection of its organization. In the decay of all central political authority, the position of the bishops tended to grow firmer. The stimulus which came to the clergy from these conditions can hardly be overrated. A vast spiritual empire, of which they were officials, was rapidly becoming more firmly established, and their responsibilities were therefore all the greater. The barbarian invaders were already won to Christianity, and the bishops were soon accorded places of honor and influence. They were the counsellors of kings, and, at the same time, the leaders and defenders of the people. Their position in the government of the city was beside the count or other representative of the royal power, and their influence was invariably thrown in favor of the Roman Law and against the barbarous customs retained by the new occupants of the land.

## SECTION II. — THE TEUTONIC SYSTEM

The law of the invaders is first of all characterized by its limitation as to the persons who were amenable to it, or who could claim its protection. This characteristic, which has been termed the personality of the law, has often been pointed out as a fundamental difference between the barbarian and the Roman Law. This is true as far as concerns the actual condition of that law at the time of the invasions. The Roman Law was applicable to every inhabitant of the Empire, and the distinction before the law between citizen and stranger had long been abolished. Yet only the slightest acquaintance with the history of Roman

<sup>1</sup> Cf. the interesting account of this office of the bishops in Neander's *Memorials of Christian Life*, English translation, London, 1852, p. 218 ff.

Law is needed to recall the numerous points wherein a sharp line had been drawn between those who might, and who might not, employ the forms of the law and transact business under its protection. The hardships in the matter of marriage, to which the plebeians were subjected in the early days, are examples. The particularly defenceless position of the *peregrinus*, the rise of the *jus gentium* and the jurisdiction of the prætor, the abolition of the older forms which could be used by only a favored few — all these instances prove that personality of the law was at one time deeply implanted in the structure of the jurisprudence of Rome. But its presence in the Roman Law was not singular, personality being a characteristic of all early law; for primitive peoples have always held that laws were the peculiar right of those who had originated them. This was true of the Greek quite as much as of the Roman Law, and numerous indications of the personality of the early law lingered long in the customs of the country. This exclusiveness of the law was chiefly due to the intimate connection between it and religion. The stranger had no right to invoke the deities peculiar to the land. The oaths with which contracts were concluded were impossible in the case of a stranger, because he did not revere the deities whose sanctity gave binding force to those oaths. Decisions in cases of dispute were regarded as inspired by heaven, and were only for those who worshipped the tribal or national gods and acknowledged their authority. In the personality of the law which appeared in the kingdoms founded by the barbarians there was consequently a reversion to a more primitive type. The manifest and constant tendency toward a territorial application of the law was an evolution similar to that through which the Roman Law had already passed.

The situation was complicated by the presence side by side of two codes of law. The Roman inhabitant of the land lived under the Roman Law, and justice was in his

case administered by its precepts. The magistrate was called upon to decide according to both codes, and was assisted in the exercise of his functions by assessors representing both systems. There was nothing extraordinary in this, when one considers the intimate and exclusive relation of the law to a people and the religious position which it assumes among a primitive race. A very similar condition obtains in India to-day.<sup>1</sup> It is well known that in India the Hindus are judged according to Hindu law, the Mohammedans according to Mohammedan law. This is then a modern case of two laws, belonging to subject nationalities, existing in connection with, and in distinction to, the law of the conqueror. This was the case in the barbarian kingdoms. At first there was merely the distinction between the law of the conqueror and of the conquered, or the barbarian law and the Roman Law; but with the extension of the various kingdoms the laws became greatly involved, until two or more legal systems belonging to subject races existed side by side with the law of the dominant race.<sup>2</sup>

A second characteristic of the barbarian codes is the large amount of space devoted to matters of a penal nature. They were codes prepared for a comparatively lawless people who were being gradually brought under the control of law. If, then, we were to make a comparison between the barbarian codes and their modern successors, it would not be made with the latter as a whole, but with the division known as the criminal code. For the ancient codes consist largely of proscriptions, of weregelds, and of statements of punishments. These codes were compiled

<sup>1</sup> Cf. J. D. Mayne, *A Treatise on Hindu Law and Usage*, Madras, 1888. § 45. "A family migrating from a part of India where the Mitakshara, or the Mithila, system prevailed, to Bengal, would not come under the Bengal law from the mere fact of its having taken Bengal as its domicile. And this rule would apply as much to matters of succession to land as to the purely personal relations of the members of the family."

<sup>2</sup> On this whole question cf. Savigny, *Geschichte des Römischen Rechts im Mittelalter*, chap. III.



when the duty of the central authority of the kingdom was to determine the customary punishment for crime, and thus to limit private vengeance, rather than to punish the offender or to regulate civil controversies and dealings. In that code which was least affected by the Roman Law, the *Lex Salica*, no less than three hundred and forty-three paragraphs contain penal articles, and only sixty-five are devoted to all other matters. One hundred and thirteen paragraphs are concerned with offences against the person, and about one hundred and fifty with robbery, one-half of which are cases of the theft of animals. This is undoubtedly an extreme case; but it shows the spirit of the law among the most characteristically Teutonic race that ever entered Gaul. The State had hardly begun to exist as an institution. The individual with his own hand sought compensation for wrongs suffered. The act which is to-day described as a crime was then looked upon rather as a private wrong. The wronged party, not the State or that which stood for the State, brought suit. The early law of Rome, as set forth in the Twelve Tables, and indeed the early law of nearly all peoples, passed through the same stage of development. The significance of the presence of this element of self-help in the barbarian codes is found in the course of the orderly development of this principle in the law of Rome. After a thousand years, the primitive conception was suddenly recalled and combined with the Roman Law, and the effect of this union is still felt.

A distinction should be made among the codes which appeared immediately after the barbarian invasion. On the one hand, there were those which were merely compilations of the laws and customs of the barbarians; and these codes were applicable, in the new kingdoms established within the Empire, to the barbarians only and not to the Romans. On the other hand, there were those which were drawn up exclusively for the use of the

Romans, being in fact merely new Roman codes adapted to the conditions under which the Roman inhabitants of those kingdoms were living. A further classification might be made of those laws which were intended to be of universal application; but the territoriality of the law was slowly acquired.

The codes of principal historic interest are the following: of the Ostrogoths, the *Edictum Theodorici*; of the Franks, the *Lex Salica*, the *Lex Ripuaria*, and the *Lex Francorum Chamavorum*; of the Visigoths, the *Lex Visigothorum* (in two codes, one known as *Forum Judicum* and *Judicum Liber*, intended for the barbarians; and the other as *Lex Romana*, also known as *Liber Legum*, *Liber Legum Romanorum*, *Lex Theodosii*, and best known as *Breviarium Alarici*, intended for the Roman inhabitants); and of the Burgundians, likewise in two codes, the *Lex Gundobada* for the Burgundian invaders, and the *Lex Romana Burgundiorum*, known also as *Papianus*. In addition to these have been preserved many early laws, some of which had been digested in the form of a code. Among these are the codes of the Alamanni, the Bavarians, the Frisians, the Thuringians, the Saxons, the Anglo-Saxons, and the Lombards, and in the case of Celtic tribes, the Welsh laws, and the ancient Brehon law of Ireland.

Among the earliest of the barbarian codes that have been preserved was that promulgated by Theodoric the Ostrogoth in the year 500 — probably on the occasion of his visit to Rome in that year.<sup>1</sup> This code, known as the *Edictum*, is entirely unlike the other barbarian codes, inasmuch as it contains hardly a trace of German law or German thought. As Dahn has shown, it is thoroughly Roman.<sup>2</sup> Of the one hundred and fifty-four paragraphs of the Edict, one hundred and thirty-eight have been taken from Roman Law. Of these, forty-two paragraphs were

<sup>1</sup> Cf. Hodgkin, *op. cit.*, III, p. 306.

<sup>2</sup> Dahn, *op. cit.*, Vol. IV, pp. 1-122.

taken from the Theodosian Code, thirty from the Sentences of Paul, fourteen from the constitutions of Diocletian and Maximinian, four from Ulpian, and the remainder from other Roman sources. It is not, however, an exhaustive collection of laws. It apparently follows no system. Testimony of slaves (§ 48 f.), conveyance of property (§§ 49-53), divorce (§ 54), appeals (§ 55), cattle lifting (§§ 56-58), standing side by side, show the confusion. The most plausible explanation of the form of the Edict is that it was made up from actual cases which had been decided by the king or some officer of the court, and that they had been arranged in the order in which they were decided.

The occasion for this Edict is set forth in the prologue: —

“Many complaints have reached our ears that some persons in the province trample the precepts of the laws under foot. And though no one can possibly claim the authority of the laws to defend an unjust deed, yet we, having regard to the peace of the community, and having before our eyes those events which may frequently occur, do, in order to terminate cases of this kind, decree these presents, in order that reverence for public right being kept intact and the laws being observed with the utmost devotion by all, both barbarians and Romans may know from the present edicts what course they ought to pursue in respect to the several articles here set forth.” In the epilogue the character of the Edict is further given: “Those cases which either the brevity of the Edict or our public cares have not allowed us to comprehend in the foregoing, must be terminated, when they arise, by the regular course of the laws.” The aim of the Edict seems to have been the protection of the weak against the strong, the Romans against the violence of the Goths, and the poor freeman against the nobles.<sup>1</sup> In order to secure this result, the main points of the Edict were: —

<sup>1</sup> Dahn, *op. cit.*, Vol. IV. p. 14.



(1) The absolute prohibition of all self-help, and the establishment of a strong and uncorrupt court.

(2) Regulation and protection of matters relating to estates and

(3) Their most important adjuncts, slaves and cattle.

(4) Sexual crimes. Tsk Tsk

(5) Violent and malicious injury to property and freedom in general.

The Edict has been described as the briefest and most imperfect of the barbarian codes. Theodoric, however, did not attempt to set forth a code; neither did he attempt to force together Goths and Romans, but rather to provide for their peaceable existence side by side. The Edict was therefore an attempt to bring the Goths under the authority of the law.

The codes of the Franks, although not the earliest that appeared in the kingdoms of the barbarians, are those which were least affected by the Roman spirit; and though the date at which they were actually compiled is uncertain, the contents are undoubtedly of a very early period. The earliest Frankish code was the *Lex Salica*. The time of its compilation is uncertain; by some its date is placed after that of Clovis (486-507), but the weight of authority seems to favor a date before the middle of that king's reign. The earliest manuscripts in which it has been preserved are of the eighth and ninth centuries, but these texts do not contain the Salic Law itself, but only a recension of it. The texts which have been preserved refer the first compilation to a period earlier than that of the invasion, at a time when the Franks were still heathen. "Afterward, when, with the help of God, Chlodwig the long-haired, the beautiful, the illustrious king of the Franks, had received the first Catholic baptism, everything in his covenant (*pacto*)<sup>1</sup> that was considered improper was clearly emended by the glorious kings

<sup>1</sup> So called because laws were promulgated by common consent.

Chlodwig, Childebert, and Chlotaire, and this decree promulgated." There is no evidence that this Salic Law was ever reduced to writing before the invasion, or that any version of it existed in writing until a late period. And it is quite probable that the law existed merely as the memory of decisions which had been made — a sort of primitive case law.<sup>1</sup>

In this Salic Law are two features important as characteristic of all the early law. Those features are of procedure; namely, the distinction between fact and law, and the method of ascertaining the facts. The first thing to be done in any suit at law was to compel the defendant to appear before the tribal gathering of the freemen. Here the question of what was the law was decided by the freemen present. This settled, the next point was to ascertain the facts. But there was little or no attempt to adduce logical proof. Witnesses played but a small part in the proceedings; the evidence was almost wholly that of ordeal or compurgation.

The ordeal was essentially a barbarian custom and appears in barbarian and savage systems generally. "Nothing can be more contrary to the spirit in which the ordeal is conceived than the maxim of the Civil Law, *Accusatore non probante, reus absolvitur.*"<sup>2</sup> The form in use among the Salian Franks was that by hot water; and this was for a long time the form which met with the greatest approval. Its origin was distinctly heathen, but it was adopted by Christians and surrounded with various religious rites. Hincmar of Rheims<sup>3</sup> saw in the hot

<sup>1</sup> Cf. the first section of the title *De Exspoliationibus. Si quis hominem mortuum antequam in terram mittatur in furtum exspoliaverit* MDCCC. den. qui faciunt solid. XLV. et in alia sententia, MMD. denar. qui faciunt sol. LXII. cum dimidio, culpabilis judicetur. Two different punishments for the same offence, because of two different opinions, on which the law is founded.

<sup>2</sup> H. C. Lea, *Superstition and Force*, Phila., 1866, p. 187.

<sup>3</sup> Hincmar, *De Devortio Lotharii et Teutbergae Interrog.* VI.

water a twofold symbolism of the destruction of the wicked, — the flood, and the final fate of evil men. When the custom was thus fitted into the religious thought, its survival was assured. Other forms of ordeal were probably in use among the Franks, such as trial by combat, which was general among the barbarians.<sup>1</sup> According to Cassiodorus,<sup>2</sup> Theodoric attempted to abolish it among the Ostrogoths.

The compurgation was equally important. There was rarely any attempt to bring forward evidence. A number of the relatives and friends of the accused came forward and swore, according to a prescribed formula, that the oath which the accused had taken in denying the accusation was true. Such evidence, however small was its legal value, was nearly the only form in use. The sifting of long depositions, the balancing of probabilities, the weighing of contradictory evidence, were matters too refined for the time.

— The Salic Law is best known because of the appeal to that law in connection with the disputes as to the accession of *Philippe le Long* and the quarrel between Philip of Valois and Edward III of England as to succession to the throne of France. The Salic Law forbade the possession of Salic land by women; hence it was argued that the throne of France was subject to that law. Its application to succession to the throne is not found prior to the fourteenth century. When it was first so applied is unknown. The Salic Law was of some importance in England, portions of it having been introduced by the Normans.

The Ripuarian Franks dwelt near the Rhine, having Cologne as their chief city. They had much in common with the Salian Franks, and the *Lex Salica* was, in large part, early adopted by them. Their code is clearly of

<sup>1</sup> See to the contrary Glasson, *Droit et Institutions de l'Angleterre*, I, p. 248.

<sup>2</sup> *Varia*, Lib. III, *Epist.* 23, 24.



later origin than is the written Salic Law. No less than thirty-two chapters (32-64) of their code have been taken, with only slight additions, from the earlier law. Its composition probably covered a long period. According to Sohml,<sup>1</sup> who divides the whole code into eighty-nine chapters, chapters 1-31, containing matter not in the Salic Code, belong to the first part of the sixth century; chapters 32-64, to the latter part of the same century; chapters 65-79 to the following century; while the remaining chapters, 80-89, are to be dated as late as the eighth century.

The eighty-nine chapters may be divided into two hundred and twenty, or more, articles, of which more than one-half are concerned with what would to-day be called criminal matters. The characteristic of this code is greater minuteness of regulation than is found in the Salic Law as to compurgation and the number of compurgators. Indeed, it is the main characteristic of this code that it is so clear in its legislation as to compurgation. There was no fixed formula for the oath taken by the *conjuratores*; but the presence in such widely separated points as England, Lombardy, and France, of substantially the same form of oath implies a common idea running through barbarian legislation. However the prescribed formula varied, the idea of making clean the defendant's oath persisted. The conditions of the admission of this form of proof are obscure. It may have been optional in some cases, and in others allowable if there were no witness. But it seems to have been regarded as final, even when the actual evidence uncontrovertibly indicated the guilt of the accused.<sup>2</sup>

In this code also there was a careful gradation of offences and penalties. The enormity of the offence was estimated according to the condition of the person who was injured, whether a Frank, a Roman, or a slave; according to the

<sup>1</sup> See his edition in the *Mon. Germ. Hist., Leges*, Vol. V, Part 2, 1883.

<sup>2</sup> See H. C. Lea, *op. cit.*, pp. 13-71.

condition of the person committing the injury; and according to the precise nature of the injury itself. This code is furthermore marked by the prominence which is assigned to trial by battle. This resort has been regarded as chiefly connected with the lawless practices of revenge or self-help. This was certainly to a large extent the case, and no doubt weregeld was often refused and battle chosen in its place. But when the battle became invested with certain ceremonials and was to take place before witnesses, it was more in the nature of an ordeal. The arm of the innocent was supposed to be strengthened by Heaven. This was the legal value of this form of trial. The mere matter of revenge, a *lex talionis*, would have been possible without any judicial battle, as was the case among the early Romans and Hebrews.

The Ripuarian Law was, on the whole, an advance upon the Salic. There was therein relatively more in connection with civil matters. There were also other marks of greater civilization. In conquered Gaul the idea of kingship, as distinct from mere tribal chieftainship, began to be clearly defined. The man who belonged to the king's retinue had a larger weregeld set on his life. Furthermore, the Roman Law was distinctly recognized in this code; but in general the Franks did not use that law. They neither codified it nor to any extent adopted it. Indeed, its very declaration and interpretation were for many years left entirely to the Romans themselves.

The *Lex Francorum Chamavorum* is the least important of the Frankish codes. The text is very short, and it contains little that is original. The consensus of authority classes it as a mere collection of local usages peculiar to a somewhat uncertainly defined territory known, among other names, as Amor or Hamaland.

The Burgundians and the Visigoths not only codified their own laws, but also promulgated a modified and rearranged code of Roman Law.

The Visigotho-Roman Code of Spain preceded by one hundred years the first purely Visigothic collection of laws of which a manuscript has been discovered. This Visigotho-Roman Code was published by Alaric II (483-506) in the first decade of the sixth century. It is cited as the *Liber Aniani*, — from the official counter-signature of Anianus, the referendary, which was attached to each authentic copy, — as the *Lex Romana Visigothorum*, or as the *Breviarium Alarici*. It is under the last name — or rather its anglicized version, the *Breviary of Alaric* — that we best know this important code. It is important, because for centuries in Western Europe it was the Roman Law, and when that law was cited the reference was to the Breviary of Alaric and not to the Code of Theodosius. It is also important because before the discovery of the palimpsest of Verona (1816) hardly anything was known of the Institutes of Gaius or the Sentences of Paul, save from the Breviary of Alaric.

This barbarian code contained by no means contracted abridgments of the Code of Theodosius, the Novels of Theodosius and his successors, the Institutes of Gaius, and the Sentences of Paul, Papinian, and other juriconsults. All these texts, save the Institutes of Gaius, were accompanied by a commentary styled the *Interpretatio*.

Although the manuscripts of the Visigotho-Roman Code antedate the purely Visigothic Code, yet the laws contained in the latter were centuries older in usage among the Goths than were the Roman laws. But the preservation of these early laws has been such that they have come to us in a series of fragments, concerning which unsettled controversies still rage. These fragments have been attributed to the kings Euric (466-483); Alaric II (483-506); Theudis (531-548); and Leovigild (570-586).

It is, however, the code attributed to Recceswinth (652-672) — an enlargement and continuation of the code



of *Chindaswinth* (644-652) — which is of the greatest importance in our present inquiry. *Chindaswinth* and *Recceswinth* gave a decided forward impulse to the long process of amalgamation between the Goths and the Spanish, or descendants of the Roman provincials, when they deprived the Spanish of the Visigotho-Roman law-book, the *Breviarium Alarici*, and substituted what was perhaps the first draft of the code known to the Middle Ages as the *Liber Judicum* or *Forum Judicum*.

The *Forum Judicum* is by no means as purely Teutonic as the *Lex Salica* or the *Lex Ripuaria*. It is strongly tinged by the Roman Law, although that law was formally interdicted by it. By this interdiction a powerful blow was struck at the "personality" of law. In the Middle Ages the *Forum Judicum* was translated into Castilian and became the celebrated *Enero Juzgo*, under which name it enjoyed a long acceptance and high authority in Spain.

The Burgundians were old neighbors and allies (*foederati*) of the Romans. Indeed, they were called to the aid of Rome by Valentinian I (370), and later, in the middle of the fifth century, were sought in alliance by the Gallo-Romans. In short, the Burgundians were friends and imitators of the Romans, and it is therefore natural that the Roman Law should find a place of honor in the Burgundian Code, or codes — for, as among the Visigoths, there were two codes. The first of these was the Burgundian Code proper. This was known by various titles: *Liber Constitutionum*; *Lex inter Burgundiones et Romanos*; *Liber legum Gundobati*; *Liber Gundobati*; and *Lex Gundobada*. Perhaps the most common citation was to the *Lex Gundobada*.

Gundobad, king of the Burgundians, collected the customary law and the edicts of his predecessors, and promulgated two codes. That cited by his name is his second code, revised by his son Sigismond in 517. The *Lex*

*Gundobada* is impregnated with Roman Law. It differed from the Frankish codes in that it did not preserve the doctrine of personality. It differed from the Gothic *Liber Iudicum*, for by that code the strict territoriality of the law was enforced. The *Lex Gundobada* illustrated an intermediate stage of legal development, in that it allowed the Burgundians, in certain processes, to be judged by the Burgundo-Roman Law.

The code promulgated for the Romans of Burgundy has been variously styled *Lex Romana*; *Liber legis Theodosii et Novellarum*; and *Papianus*, or *Lex Papiani*; and it is by the name of Papinian that we most frequently read of it. The ascription of this code to the Roman jurist Papinianus is an error which has arisen from the mistake of an early copyist, often repeated by later scribes.

The *Lex Papiani* is an adaptation of the Theodosian Code. It presents indications of a common parentage with the *Interpretatio* of the *Breviarium Alarici*. It contains fragments of the work of Roman jurists not elsewhere preserved. By this code, the wergeld system, for centuries so peculiarly Germanic, is reimposed upon the Romans. With the Visigoth and Burgundian codes territoriality triumphed.

## PART III

### *THE BEGINNINGS OF MODERN JURISPRUDENCE*

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#### CHAPTER XIV

##### THE RENEWED STUDY OF ROMAN LAW

THE Holy Roman Empire was at the height of its glory and power in the twelfth century. The Roman tradition, which had first attained a definite form in the coronation of Charlemagne as Roman emperor, was at this point in history brought into immediate union with the legal tradition, which began to bear new and abundant fruit in the revival of legal study. Whether the splendor of the imperial system, or the profound science of the jurists of Bologna, was the cause of the greater vividness with which the imperial idea was conceived is not easy to determine. But the significance of the coincidence of these two facts is thereby made none the less great, and their mutual assistance none the less powerful in shaping the future of Roman Law.

The emperors had for centuries claimed to be Roman emperors, and they imitated the Roman forms with a fidelity which to us seems puerile.<sup>1</sup> The barbarians had delighted in the titles bestowed upon them by their timid Roman allies; and even when, by their own swords, they

<sup>1</sup> Cf. Bryce, *Holy Roman Empire*, Lond., 1884, chap. XVII.



had won kingdoms for themselves, they were entirely willing to assume a supposed legal right to their conquest by associating themselves with the imperial system. Even a barbarian as fierce and untutored as Clovis was willing to become a Roman consul and to identify his authority with that of the Western Roman Empire, which still lingered in a shadowy, but awe-inspiring, tradition. The Roman Law had been in great part adopted by the Visigoths, and had become dominant in Gaul—the seat of the greatest power in the West. The majority of the inhabitants of the new kingdoms had always continued to live according to the more refined prescriptions of that law; and the rude compilations of the barbarian conquerors had gradually been permeated by the spirit of the ancient jurisprudence. At no time during the Middle Ages did study of the Roman Law entirely cease, and at no time was the thought of the Roman Empire as an actual, living institution completely abandoned. The two went hand in hand. Although the proofs which have been adduced by Savigny of the continual study of the Roman system of law may not be conclusive in the form in which they are put,<sup>1</sup> yet the fact that in the Dark Ages Roman Law was known—not merely in the form in which it had been incorporated in the Visigothic law-books, but in the Pandects as well—is sufficient proof that it did not remain wholly neglected. It was preparing to arise from its weak and precarious condition and to go forth to conquer the world.

Constantly present as a stimulus, both to the idea of the Empire and to the study of the Roman Law, was the Roman Church. The effect of the imperial system upon the claims of the Western patriarchs may be put to one side. The power of the Church as an all-pervading institution with its centre in Rome: the immediate influence of a multitude of ecclesiastics owing allegiance to one who

<sup>1</sup> Cf. Hodgkin, *Italy and her Invaders*, VI, 557 ff.

sat in the city of the ancient Empire: the constant associations which must have been suggested by the occurrences of everyday life: all these turned men's thoughts in the direction of a universal empire and a universal law. The clergy claimed the protection of the Civil Law. In their own disputes they were accustomed to defer to its authority and appeal to its sanction; and the law which they imposed upon the laity was in some important points modelled upon it.

It is not strange, therefore, that in the revival of intellectual activity which took place in the twelfth century the study of Roman Law should stand on a level with that of theology. Everything tended to further this result. The political and religious system under which men lived seemed to demand it. The scientific beauty of that law attracted the mind, and the enormous importance of that law as the law of the Empire, binding upon all its inhabitants, stimulated the imagination. Even before the days of Irnerius, the study of law had become a matter of importance;<sup>1</sup> but from the advent of that celebrated jurist at the Bologna University, the earliest in Europe, that study began to be all-important. The Digest and other parts of the Justinian collections were made the subjects of an elaborate interpretation, and thus was laid the foundation of modern jurisprudence.

Under Irnerius the school of Bologna produced the gloss to the *Corpus Juris Civilis*. This gloss was originally merely a brief comment upon the text, an occasional explanation of words and phrases which seemed obscure. From this small beginning it grew until it became an elaborate exposition of the text. Every parallel passage was cited and brought to bear upon an obscurity. Glosses were composed upon a previous gloss, and new ones were written, until the whole became a vast apparatus. The

<sup>1</sup> Cf. Ortolan, *Histoire de la Législation Romaine*, Paris, 1884, §§ 607-612.

spirit of the new system was, however, not historical; that method of study was left for the literary Renaissance, with its attempt to reconstruct in its entirety the life of ancient Rome. The doctors of Bologna were often profoundly ignorant of Roman history and made the most astounding mistakes in chronology; but the law was the fundamental law of the Empire under which they lived, and, as an authoritative collection of law, was in their eyes as independent of the historical circumstances under which it arose as were the records of the divine revelation in the eyes of the theologians. The work of the glossators was not disturbed by any question of criticism; the whole spirit of the time was full of the principle of authority, and the Empire was an institution but little less sacred than the Church. The two powers which controlled men's earthly lives and heavenly destinies were in accord in this respect also.

The work of the first period of the revived study of Roman Law came to an end with the compilations of Accursius (1182-1260). The glosses of the different teachers of law<sup>1</sup> had grown to an enormous extent. The various comments which had been made were often in conflict with one another. The work of Accursius was the compilation from the many contradictory glosses of one consistent gloss which might take their place. This work was completed by his sons, and it at once became the authoritative interpretation of the law; so much so, that in the tribunals it practically took the place of the law. The gloss had all the force of law itself; when there seemed to be contradiction between the gloss and the text, the former prevailed. Reaction was sure to come; but public opinion at the time was summed up in the words, attributed to more than one legist, which represented the enthusiastic student as declaring that he would rather have

<sup>1</sup> The various teachers of law at Bologna and elsewhere are treated by Savigny, *op. cit.*



on his side the gloss than the text; for if he appealed to the authority of the latter, he would be answered: "Do you not think that the gloss saw that text as well as you, and understood it better?"

The reaction from the absolute deference paid to the Accursian gloss was finally brought about by Bartolus (1314-57). This famous civilian taught at the University of Pisa according to a new method, which soon became so popular as to supersede that of the glossators. The method of Bartolus was scholastic and dialectic; being possessed of enormous erudition and unusual imagination, he was able to bring together every possible opinion, actual or theoretical, upon the text, arranging them in order and discussing them in detail, and to invent innumerable cases which might illustrate and develop the theory and practice of the law. The new method was distinctly practical, while at the same time its results were eminently scientific; but the excessive subtlety of the comments and their enormous prolixity was eventually detrimental to the study of the law. It became impossible for the instructor to do more than treat a few passages and leave the remainder of the text to the private examination of the student.

The interest which was excited by the new schools of law at Bologna was boundless. From all quarters of Europe students flocked to Italy, and especially to Bologna, and they took back with them to their own countries the enthusiasm which they had acquired for the study of Roman jurisprudence. An attempt was very early made to found a school of law at Paris; but that university's fame in theology had already become established, and the manner in which the Bolognese students became completely absorbed in the study of law made the ecclesiastical authorities jealous of its influence in their great theological centre. Further reason may possibly be found in a desire to retain for Bologna a practical monopoly of legal

instruction, which was by no means unlucrative. The teaching of Civil Law at Paris was forbidden by a papal bull. In 1162 the Council of Tours, over which Alexander III presided, forbade the study of law or physics by any one in holy orders; and in 1220 Honorius III republished this decree and, under pain of excommunication, forbade law to be taught in Paris or any of the neighboring towns.

The historical significance of the revival of the study of Roman Law in Italy in the twelfth century is by no means limited to the scientific side of that study. There was a direct and practical result as well. In the towns and cities of Italy the legists of distinction were often called upon to act as magistrates. They were convinced that the Roman Law was *de jure* binding upon every one, and they inspired their pupils with this belief. Wherever pupil or teacher went, he carried with him the conviction that the one supreme source of law was the Roman Law of Justinian; and in the positions which they were called upon to occupy they were able to incorporate this law in the opinions which they were asked to deliver. In England, France, and Germany the influence of ecclesiastics learned in the law—for the prohibition of the study of law by clerics, although incorporated in the body of Canon Law, remained a dead letter—was almost equally great. The chief advisers of kings and emperors were ecclesiastics; and bishops frequently held positions of great importance in the judicial system of their country. As a rule, these bishops were trained in the Civil Law, and they were naturally guided by its principles even while in many respects they admitted the authority of the local laws.

The authority of the imperial and kingly courts was also on the side of the Roman Law for other reasons than because of the philosophical principles which were everywhere manifest within it. The conception of the law in regard to the power of the emperor in the Church and

Empire was that which commended the Roman Law to the rulers. That conception was sufficiently extended to satisfy the demands of the most arbitrary and despotic. The law knew nothing of the supreme authority of the pope; it was the emperor who had supreme authority, according to its conception, in Church as well as State. The will of the ruler was the law of the land. Little as such principles might be suited to the times, they were admirably suited to the desires of the emperor, and the rulers of other countries were glad to follow his example by favoring the law. On the other hand, in some places the law was vehemently opposed for the very same reason. It was held to be subversive of the rights and freedom of the subject. Indeed, it is very probable that much of the favor and opposition with which the law, in different places, met from other than close students thereof, sprang from other considerations than its intrinsic qualities. The varying reception of the Roman Law in England, Germany, and other countries will amply illustrate this point.

The study of the Roman Law in France was for a time pursued only with great difficulty, because of the opposition of the Church. But after the bull of Honorius, a school was organized in 1236 at Orleans, which was beyond the prohibited area; and the other schools which had been founded at a distance from Paris, such as that of Montpellier — founded by Placentinus in 1180 — and of Tours, became more flourishing. The schools in the south of France were the more necessary, inasmuch as the Roman Law, though more or less mutilated, had continued in force in that section. But the French school of law did not attain its most brilliant period until the advent of humanism and the historical interpretation of the law, founded upon a knowledge of Roman antiquity. The founder of this humanistic French school was Alciati, who from 1518 to his death in 1550 taught at Avignon, Milan, Bourges, Pavia, and Bologna. The study of law had to



a great extent degenerated into an arithmetical enumeration of the glosses for or against a certain interpretation—a custom as unscientific as was the law of Valentinian III as to citations. Alciati's reform was based upon the intelligent study and weighing of the reasons for or against the interpretation, and the illustration of the text and ascertainment of its meaning from the Roman writers. Self-evident as seem these principles, they were little less than revolutionary in the early years of the sixteenth century, and the impetus given by them to the study of law was enormous. That study became a part of the great intellectual life of the time. It was as necessary for the understanding of Roman thought and life, as the understanding of these was necessary to the interpretation of the law. Alciati's most famous pupil, Cujas, attained such eminence as an expounder of Roman Law that by a decree of the Parliament of Paris he was permitted to lecture on the subject in that city, though the permission was soon afterward revoked. The works of this great teacher are among the most important ever written upon the Civil Law, and his fame spread throughout Europe.

The study of Roman Law very early began in England and Holland as well as in France. The labors of the distinguished jurists of the school of Holland have far surpassed the work of their English contemporaries, and have placed Dutch jurisprudence in the forefront of legal science. The rise of the Dutch school dates from the Spanish rule in the Low Countries. As early as 1254, the University of Salamanca had been founded in imitation of that of Bologna, and the imperial interests favored the extension of the study of Roman Law throughout the Roman Empire and its dependencies; but the influence of the great French school was the most powerful impulse to that study in Holland. Donellus, who had been driven from France because of his religious opinions, raised the study of Civil Law to a very high degree of excellence at

the University of Leyden, and soon important schools were founded at Utrecht, Francker, Harderwyk, and Groningen. The work and aim of Donellus (1527-91) were in marked contrast to those of his great contemporary Cujas. While the latter was distinctly a humanist, the former was primarily a scientific jurist. Donellus aimed to comprehend the Roman Law as a whole, and to show how all the parts formed one grand system, which fitted into every phase of life. As Grueber well says: "He endeavored to grasp Roman Law as a system, the single parts of which are strictly connected with one another. His lifelong efforts in this direction found a worthy conclusion in his famous *Commentarii Juris Civilis*, which contain a complete system of Roman private law, carefully worked out to its consequences." The arrangement of this work was somewhat after that of Gaius, but it differed from the Institutes of the Roman in that the latter were founded upon the differences of the law itself, whereas the system of Donellus was founded upon a difference in the nature of private rights: "rights attaching to persons immediately, or right of persons with reference to property, or right of obligation."<sup>1</sup>

The greatest ornaments of Dutch jurisprudence are Grotius, Vinnius, Huber, Voet, Schulting, and Bynkershoek. So great was the authority of Voet that in Scotland he was regarded as Blackstone was regarded in America.

The exclusive devotion to the formalism of the Roman Law manifested by the great legal minds, and their comparative neglect of the application of its principles to actual life, brought about an inevitable reaction. The labors of Cujas and Donellus, admirable as were the results, were not in harmony with the rising spirit of nationality. At the close of the sixteenth century, the authority of the Empire and the power of its tradition meant comparatively little, although the actual power of

<sup>1</sup> Cf. Stintzing, *Geschichte der Deutschen Rechtswissenschaft*, I, p. 378 ff.

the emperor, owing to favorable dynastic events, was never greater. France and England could hardly be expected to allow his widespreading claims. The revocation of the right of Cujas to lecture in Paris was due to the opposition that arose in France against the Roman Law as essentially a foreign and inapplicable system; it was denounced as antiquated and absurd. The distinctions which the Romans had maintained from the very earliest times, and which had remained in the law merely as interesting survivals, were the special objects of ridicule. The most outspoken of the antagonists to the study of the law was Hottman, who in his *Anti-Tribonianus*, written in 1567, attacked the whole system. This work was first published in 1609 in a French translation, and later in the original Latin.

Among the later French writers on Roman Law may be mentioned Denys Godefroy (1549-1622) who at the time of the religious persecution took refuge in Geneva and afterward at Strasburg. Even more famous was his son, Jacques Godefroy. The father became celebrated through his edition of the *Corpus Juris*; the son achieved fame by his commentary on the Theodosian Code. Domat (1625-93) may be mentioned as the greatest name of the latter half of the seventeenth century. But Pothier (1699-1772) probably contributed more to practical legislation than did any other French legist. By the labor of twelve years, he was enabled to accomplish the reduction of the vast mass of the *Corpus Juris* to a systematic order. His great work is known as *Pandectæ Justinianæ in novum ordinem digestæ* (1748-52). His aim was to reduce the Code, Digest, Institutes, and Novels to a carefully revised and logically arranged code. He retained the order of titles in the Digest, but arranged the subdivisions in proper order, so that the history and actually resulting conditions of the law could be easily ascertained. By very clear and learned notes he added to the value of

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the whole. The importance of the work of Pothier lay not merely in the great intrinsic merit thereof, but in the part played by that work in the subsequent compilation of the French Code. Savigny says of him: "It is universally known that, with regard to Roman Law, Pothier is the pole-star of the modern French jurists, and that his works exercised the most immediate influence upon the Code." Dupin, in his *Dissertation sur la vie et les ouvrages de Pothier*, says that three-fourths of the Code was literally extracted from his treatises; and Windschied says: "In particular, the law of obligations is to a great extent little more than a compilation from the various treatises of Pothier."

The German school of writers on Roman Law is of comparatively modern date, although the foundations of a scientific study of the Civil Law were laid as far back as the days of humanism. Intelligent study of the ancient life was impossible without study of the law, and the importance of the Roman Law had been greatly increased by the change in its standing in the courts of the Empire. The names of those who were first famous as teachers in Germany were those of foreigners, Donellus and Godefroy being among them. The eighteenth century produced nothing in Germany which could stand comparison with the works of Pothier. The works which were produced were so strongly permeated with the philosophy of the period as to render them less effective. The appreciation of history and the historical method of study were not congenial to the German thought of that day. The dogmatic method was preferred; above all, the method which aimed to present the law as an abstract natural law rather than a living concrete system. The most distinguished name of that era in Germany was that of Heineccius (died 1741) who attained a European celebrity, and is still known through the use made of his work by Gibbon.<sup>1</sup>

<sup>1</sup> *Decline and Fall of the Roman Empire*, chap. XLIV.

The new German school of Roman Law is known as the historical school, and with it has been largely associated the name of Savigny. It was, however, the creation of no one mind, though the works of the great master were profoundly significant and undoubtedly influential. The school was the outgrowth of the changed conceptions of life and history which were introduced by the philosophy which succeeded the revolution in thought effected by Kant. Interest was no longer attached to the world as a thing complete, but as one ever becoming; interest also was turned to history as the gradual self-evolution of the human race, as man's growing to consciousness of himself in the course of the world's life. The conception of law changed from that of the arbitrary will of the ruler, or the command of an authority capable of enforcing its will, to that of the expression of the will of a people, the result of the historical life of a nation. The historical school has met with opposition, and the almost exclusive interest which it displayed in the Roman Law has been resented as being the study of a law alien in its origin. This tendency of opposition was represented by Thibaut (1772-1840). In more recent times Ihering has advocated the conception of law as less the product of unconscious historical forces, or the objectification of the national will, than as the "result of a conscious struggle for the attainment of rights."

Owing to the peculiar position held by the Roman Law in Germany, the modern juristic science of that nation is the foremost in the world. To the independence of England, which was loath to acknowledge any indebtedness to Rome, is due the small part played by that country in developing and expounding the Roman Law. There the study of the Civil Law, introduced in the twelfth century by Vacarius and fostered by the earlier kings, was supplemented by the establishment in the universities by Henry VIII of chairs of that branch of knowledge. During the

century of the Protestant Reformation the study languished, for the intense nationalism of that century could not endure the alien Civil Law. The study revived in the succeeding century; but England has never produced legists of such world-wide fame as Grotius, Voet, Pothier, Savigny, and Ihering. The best scientific work done in Roman Law by English writers has been the product of modern times. Maine produced no systematic treatise, but he admirably illustrated much of the law. Holland, Clarke, Amos, and Phillimore have done much toward the elucidation of the Civil Law. Hunter has produced the best English treatise on the law of Justinian as a whole, and his *Roman Law* is worthy of being placed beside the recent German works on the Pandects. One drawback to the study of the Roman Law in England has been the tendency in that country to closely adhere to the Institutes of Gaius and Justinian as the basis of jurisprudence; another is to be found in the exclusively antiquarian principles on which the study has been pursued. An inveterate popular prejudice as to the small importance of the study of Roman Law has, until very recently, confined it to a few law scholars.

It is evident that where the careful study of Roman jurisprudence has been made the foundation of legal training, there the law must necessarily be influenced and moulded by that jurisprudence. It is also clear that where there is at hand a body of law arranged in an eminently scientific form, having much in common with a national law, much that is superior to local law, and still more for which the local law does not provide, there the tendency to adopt and apply the foreign law will be almost irresistible, especially where there is a show of right in such application and the spirit of the time favors it.



## CHAPTER XV

### THE RECEPTION OF ROMAN LAW

#### SECTION I. — ITALY

THE history of Roman Law in Italy has in part been given. The conquest by Justinian in the sixth century, and the promulgation of the Justinian laws, made the enactments of that emperor binding upon the country. But the law which had been previously in force was in all essential points the same as that promulgated by the new conqueror. The Lombard invasion imported new elements, and the imperial rule of Charlemagne affected the law in no small degree; but the ever increasing insistence on the part of the Church upon the adoption of the Roman Law, made it easy for that law to maintain itself, in spite of the fact that connection with the Eastern Empire was entirely broken off. The fame and importance of the schools of Bologna and other cities made the study of the law popular, and the employment of the Justinian Law, as expounded by the great legal doctors, customary and acceptable. This has remained the condition of affairs down to the present time. As might be expected in the home of Roman Law, that system of jurisprudence is the Common Law of the land. Statutory legislation which is contradictory to the provisions of the Roman Law takes precedence of it; but in the absence of contravening enactments its decisions and principles still hold good.

#### SECTION II. — GERMANY

*Sub-section A. Introduction of Roman Law.* — The history of the reception of the Roman Law in Germany is

longer and more involved than is the history of a similar process in any other country. It was first a consequence of the conception of the Holy Roman Empire; and in a country where the Roman emperors were numbered from Augustus down to the reigning sovereign it was not difficult to persuade men that the law of those emperors was still in force, as far as it had not been superseded by later legislation. In the time of Otto III, the formula for the installation of a judge in Rome is described as follows: "Then shall the emperor say to the judge, 'Beware lest thou on any occasion subvert the law of Justinian, our most sacred predecessor.' Then the emperor shall give into his hands the Code, and say, 'According to this book judge Rome and the whole Leonine world.'"<sup>1</sup> The Hohenstaufen were very emphatic in their claim to be successors to the ancient Cæsars; and Frederick III, Maximilian I, and Charles V delighted to speak of Justinian as their forefather in the imperial dignity.

An actual need for some such law as the Roman also facilitated its reception. The law of the Empire, so far as it was of German origin, was the law of the several component parts of that Empire. It was, therefore, confused, and was divided into a multitude of contradictory systems, having no consistent order or form; and in the active application of these multifarious laws the conflicting details far outweighed the fundamental and common elements. If there was to be any real unity of the Empire—and its growing life demanded such unity—there was need for a uniform law. There lay within reach just such a law, commended by a truly imposing tradition and by a scientific precision which alone might have served to bring about its adoption. That law was the *Corpus Juris Civilis*.

↓ In this connection two important points should be borne in mind: first, that the whole study of jurisprudence in

<sup>1</sup> Cf. Stobbe, *Geschichte der deutschen Rechtsquellen*, 613 f.

those days was Romanistic; and second, that the local courts, in which was applied the traditional national law, fell into confusion. The universities in which jurisprudence was taught were independent of any nationality. They stood under the immediate supervision of the pope, or of the pope and the emperor. Their faculties of law occupied themselves entirely with the Roman and Canon Law. The Roman Law filled the whole learned world, which was distinctly cosmopolitan. The local courts were utterly unable to keep pace with the progress which was made by society in the fifteenth and sixteenth centuries. The enormous expansion of commercial life, incidental to the discoveries of the time, found no corresponding advance in the traditional law, or in the courts which administered it. On the one hand, the advocates and other lawyers had little or no respect for the popular courts, and the doctrines which those advocates advanced in their arguments were those of their favorite Roman jurisprudence. On the other hand, popular estimate of the courts fell equally low; the busy merchant, the rich burgher, and the landowner were unwilling to bring their cases before those tribunals. They appealed rather to the courts of the rulers and to men who were actually learned in the law. The old German courts, or *Schöffengericht*, underwent no transformation, any more than did the hundred and manorial courts of England; they were gradually superseded by the imperial or royal courts.

The reform in the supreme imperial courts, and in the various courts of the component parts of the Empire, made the Roman Law even more a necessary part of the legal life and thought of that Empire and completed the process which was spontaneously taking place. By the ordinance of 1495 judges were to be sworn to give decisions according to "Common Law and the law of the Empire." This did not mean according to local custom, but according to the Civil and Canon Law. It should be borne in mind



that this ordinance was not a formal adoption of the Roman Law. That law had long since been regarded as binding upon the Empire as the imperial law. The significance of the ordinance consisted in the fact that it was the legal recognition of that law, and a demand for its application.<sup>1</sup>

The reception of the Roman Law gave rise to numerous questions as to the extent to which it was received and as to the relation in which it was to stand to the customary German law which was already in force. According to the theory on which the law was at first received, the Roman Law was binding *per se*, except in those cases in which it had been suspended by imperial edicts. It was impertinent to ask whether it should be subsidiary or paramount, should be modified by the customary law or should override it. On this theory, the Roman Law should have completely driven out the customary law of native origin. But this was not the case. The extreme form of the claims of the civilians was resisted. The German particular customs were retained, and the Roman Law was not permitted to override them. The Roman Law took in Germany the position which the Common Law held in England. Indeed, it was known as the Common Law, as it was the law common to the whole Empire.

But where the Roman Law was admitted to be applicable, the next question was as to the extent to which that law was to be understood as in force. This question arose as early as the time at which the Roman Law was received. The eminent jurist Zasius contended that that law was in force only so far as it was in harmony with the customs and institutions of the country.<sup>2</sup> He was especially opposed to the public law of the *Corpus Juris*, and protested against it as leading to an imperial despotism.<sup>3</sup>

<sup>1</sup> Cf. Dernburg, *Pandekten*, Berlin, 1892, p. 7.

<sup>2</sup> Cf. Stintzing, *op. cit.*, I, p. 168.

<sup>3</sup> The assertion of Savigny that the Roman constitutional, or public, law did not belong to the portion received is entirely arbitrary. Cf.

The work of Hermann Conring, *De Origine Juris Germanici*, (1643), was the most vigorous attack made upon the Roman Law and its applicability in Germany. He maintained with great force the following positions: "(1) The view that the *Corpus Juris Civilis* was ever published in Germany, as a law binding upon the country, is a fable entirely without foundation. (2) On the contrary, it was gradually introduced in the fifteenth century, having first been taught at the universities and afterward applied in the courts of justice. (3) It is in force only because it has been received by usage voluntarily; and consequently, only *to the extent* and in the form of such 'usu-reception'; in other words, only those provisions of the *Corpus Juris Civilis* are in force which have been actually received by usage, and those provisions only subject to such modifications as have been imposed upon them in actual usage."<sup>1</sup>

Opinion is still divided as to whether the Roman Law was received as a whole, *in complexu*, and, as such, binding except where limited by native law. The prevailing opinion is that it was so received. As advocates of this theory may be mentioned Vangerow, *Pandekten*, I, § 5; Wachter, *Gemeines Recht Deutschlands*, 1844, p. 193 ff. and *Pandekten*, I, § 11; Windshied, *Pandekten*, I, § 5, par. 1 and 2; Bekker, *Pandekten*, I, p. 6. Yet the general position has been modified to the extent that the opponent of the theory is no longer obliged to bring proof that the law is not applicable; but the judge is regarded as bound to apply the law unless he knows that it has been set aside by some special law or custom.<sup>2</sup> Among the

Savigny, *System*, I, pp. 69, 165. In the reception of that law there was made no distinction between the private and public law. The *Corpus Juris* was in force, because it was unrepealed imperial law.

<sup>1</sup> E. Grueber, Introductory Essay to the English Translation of Sohm's *Institutes of Roman Law*, Oxford, 1892, p. xxii. See Stintzing, *op. cit.*, II, p. 18 ff.

<sup>2</sup> Cf. Dernburg, *Pandekten*, Vol. I, p. 9.

opponents of the theory that the law was received *in complexu* may be mentioned Dernburg,<sup>1</sup> and Leist, *Civilistische Studien*, I, p. 12 ff.

There is, however, no difference of opinion as to the limitation of the law in respect to the portions on which no gloss was written. Everywhere and by all has been recognized the fundamental principle that *quidquid non agnoscit glossa nec agnoscit forum*. These non-glossed passages were passed over by the school of Bologna, either because they were not known to the glossators, — having been later restored from the *Basilica*,<sup>2</sup> — because they were regarded as of not sufficient importance to receive a gloss, or because they were seen to be so completely at variance with prevailing customs and practice as to be a dead letter. The limitation of the applicability of the Corpus Juris to the glossed portion was not due to the fact that the gloss was regarded as the ground of reception — although the historical connection between the influence of the universities and the introduction of the Roman Law might seem to warrant such belief — but to the fact that the omission of a gloss was regarded as evidence that the portion passed over was opposed to German customs and had been so recognized.<sup>3</sup>

There was another limitation to the authority of the Roman Law. The Canon Law was of more recent origin, and where it contradicted the Roman Law it would usually repeal the rules of the older system. This, however, was not invariably the case. Similar limitations to those placed on the Roman Law by the existence of local customs also prevented the universal applicability of the Canon Law. Those parts which were distinctly

<sup>1</sup> Cf. *Pandekten*, l. c.

<sup>2</sup> D. 48, 20, 7, 5 to 11, and D. 48, 22, 10 to 19. For the places unglossed in the Code and Novels see Vangerow, *op. cit.*, § 6, note 1. The Institutes were glossed throughout.

<sup>3</sup> Cf. Dernburg, *op. cit.*, Vol. I, p. 11.



opposed to Germanic legal principles were set aside. Thence it followed that when the two great systems were in conflict, though the Canon Law was the younger, yet it might be set aside in favor of the elder, if the latter were more in harmony with German institutions. Since the Reformation the Canon Law has been much restricted, in large portions of North Germany, by the reformed doctrines. Everything which did not agree with these was set aside, and the ecclesiastical constitution was so altered as to overthrow the great bulk of the Canon Law. The result of this action was practically to take the Canon Law out of the Common Law, and to make it rather a part of the great class of particular law, although this position has never been theoretically recognized.

*Sub-section B. Native Element in the Law.* — The native element in German jurisprudence was very much less important than was the vast mass which was borrowed from the Roman Law. It was, however, of some importance because of its relation to the Civil Law. The native element was of two kinds, namely: the customary law, which had been handed down by tradition or written at an early date, but never published with express approbation; and the statute law, which either added to or modified the traditional, or unwritten, customary law, or else gave authority to customs which were generally recognized but were not certainly binding. As at the same period in England, the traditional element was based upon the ancient customs of the race; and the test of law was its enforcement by the courts.

The period immediately following that of the Carolingian dynasties was little adapted to the production of law. There was not that demand for far-reaching legal reforms which is necessary to progress. The Empire rapidly fell to pieces, and the divisions made in the vast domain of Charlemagne were repeatedly subdivided. The imperial authority was weak, and the power of the rulers

of component parts of the Empire was relatively great. Wars disturbed the quiet growth of communities, and foreign complications distracted the attention of the emperor. The ancient codes, which had been drawn up by the various tribes, had been set aside, and nothing had been substituted for them. The only laws were the local customs of each community, as commonly understood therein, or the mere arbitrary will of the lord of the place.

Even in the deplorable condition of German law which then prevailed, and before the foundation of the universities and the introduction of the study of law, some attempts were made to compile the common law of various countries, and even of the Empire. Of these the *Sachsenspiegel* was one of the most important. It was compiled, between 1224 and 1235, by Eike von Repgow, — *schöffe*, or sheriff, of the *Grafschaft-Wettin*, and later of *Spalke* on the *Elbe*,<sup>1</sup> — in Latin, and was afterward translated into German. The Latin original has been lost. The book soon became popular, not only in Saxony but in the countries to the east, north, and west. Three different translations from the rhyming German have been preserved; there are extant also early Dutch translations of the thirteenth century, and even a Polish translation.

The work consists of two parts. The first is a book of general law — with the exception of feudal law — intended for the whole country. But the author does not seem to have been very careful in his references to the actual customs of his native land. He uses the term *Saxon* in the widest sense, including in his sketch the customs of various parts of the land which was then comprised under the general name of Saxony. The influence of *Westphalia* is discernible in his judicial system, of *Ostphalia* in his marital law of property. *Thuringia* and *Brandenburg* also contributed their quota. This wide scope no doubt

<sup>1</sup> Cf. Homeyer, *Die deutschen Rechtsbücher des Mittelalters*, Berlin, 1856, p. 17.

contributed to the great popularity of the work. The only connection with South Germany lies in a few references to divergent Suabian customs, doubtless introduced for the benefit of the Suabians who had emigrated to Saxony.<sup>1</sup>

In this first part the bulk of the material is private law; but there is some public law also, including penal law, the judicial system, and constitutional law. The arrangement is more or less arbitrary; no clear principle runs throughout. Occasionally the same point is dealt with in more than one connection. The treatment is simple, clear, and thoroughly popular, adapted to the unlearned class for which the work was designed. There is no attempt to illustrate by cases. The second part is devoted to the feudal law, and was probably composed by the same author at a period closely succeeding that of the first part. It was largely founded upon an older work known as *Auctor vetus de Beneficiis*. This work was freely annotated and enlarged by the author of the *Sachsenspiegel*. He also made use of the *Liber Feudorum* of the Lombards and the customs of the Saxon feudal courts. The use of the feudal law of the *Sachsenspiegel* was even wider than was that of its common law. It spread even to the country of the Lower Rhine on one side, and to Litesia and the Slavic countries on the other. In this wide diffusion numerous additions were made, and the original form was soon lost. Yet the second part, in spite of its extensive use, was not so historically important as was the first, inasmuch as it was more of a compilation of principles generally known and acknowledged, and did not bring together for the first time the scattered traditions of the native law.

The object of the *Sachsenspiegel* was probably twofold. First, there was the need of providing for the administra-

<sup>1</sup> Cf. Schulte, *Lehrbuch der deutschen Reichs- und Rechtsgeschichte*, § 62.



tion of justice in the changed condition of the land, brought about by the growth of a more clearly defined and regulated government, and also the need for substituting a more definite law for the oral tradition by which the bulk of the customs was preserved and handed on. Secondly, there was the desire to counteract the influence of the Roman Law, which was spreading from Bologna throughout Europe, and which found an ever present representative and propagandist in the body of the clergy.

✓ Another important law-book appeared about fifty years later than the *Sachsenspiegel*. This was the *Schwabenspiegel*. As its name implies, it was principally adapted to the use of South Germany. It did not aim to present merely the common law of one country, but rather to set forth the imperial law of Germany. It therefore included much more than the native customs, and it drew its material from the most widely scattered sources. Roman and Canon Law were freely drawn upon. Imperial laws, down to the time of Rudolph I, were included. In the work of composition the author evidently had before him the *Sachsenspiegel*, as well as the *Lex Bajuvariorum*, the *Lex Alamannorum*, the *Breviarium Alarici*, and the Capitularies of the Frankish kings and the earliest emperors.

The object of the book was attained by omitting those parts of the *Sachsenspiegel* which related only to Saxony, and the substitution in their place of the Suabian customs, to which were added such selections from other sources as might be necessary to make the work representative of the general law, as this was regarded in South Germany.

The book was divided into two parts, in the same manner as was the *Sachsenspiegel*, and was subdivided into chapters. In its rather diffuse exposition it uses some cases as illustrations. It came into general use throughout Southern Germany and Bohemia, and was translated into Bohemian, French, and Latin. In the translations,

especially in the Latin, many changes were made, so that the sense of some articles has been completely altered, and there is great divergence among the manuscripts.

Still another book of this period calls for mention — the *Spiegel Deutscher Leute*. It was composed about the same time as the *Schwabenspiegel*, and like that work is founded upon the *Sachsenspiegel*. It aimed to give the universal common law and to avoid local customs. It achieved no such popularity as did the other works mentioned, and is only significant as an attempt to give a common law for the Empire — or common law in the later sense of that term in Germany.

These and subsequent less important law-books were issued without imperial or royal authority. They were practically private works, though often undertaken through suggestion from high quarters. Many of these private codes were composed merely for the various cities or small divisions of the land; but they had about the same standing as the "text-books," which had been widely used and accepted. The authority which they enjoyed was entirely derived from their use in the courts of the country. But they were exceedingly important in connection with the development of German private law. According to the German opinion, the legislative authority of the rulers had little to do with the private law. That was a matter of custom, and should be left to the local communities to develop as they wished. The imperial law was essentially public, and yet incidentally touched private matters. Thus, in what was possibly the most important of the imperial laws — the Golden Bull of Charles IV, issued in 1356 — there were important points concerning mines, and on these the mining law of Germany was founded. The Hohenstaufers Frederick I and Frederick II sent to the Italian glossators a few laws to be incorporated in the *Corpus Juris*. These were accordingly placed in the Code, arranged under the appropriate

titles, and became known as the *Authenticæ Fredericianæ*.<sup>1</sup> Although these laws were at first intended only for Italy, through their incorporation into the body of Roman Law they came into force in Germany on the reception of the *Corpus Juris* as the imperial or common law.<sup>2</sup>

At the time of the reception of the Roman Law, there was comparatively little legislation beyond what was necessary to regulate that law and its relations to the various customs which prevailed in many places. Furthermore, the imperial constitution was undergoing a change whereby the legislative authority of the Diet became limited to matters which concerned the Empire as a whole and those things which were essential to the maintenance of the imperial unity. All other law to be observed by the various States was left to the action of the States themselves. The culmination of this process came at the time of the Westphalian Peace, when the emperor and the Empire lost all influence on the internal affairs of the various States which composed the Empire. Meanwhile the legislation of the different States came increasingly under the influence of the learned jurists, who were enthusiastic civilians. In this way the private works of eminent jurists became an exceedingly important source of the law. It is not surprising that in this period the local customary law became less and less important, and the Civil Law gained the ground lost by the native law.

The imperial legislation for this period was almost entirely confined to public law, including constitutional and penal law. Yet the law which Maximilian I promulgated in 1512 is important as regulating the form of wills, and the law of 1529 decided the long-disputed point as to

<sup>1</sup> See Mommsen and Krüger's edition of the *Corpus Juris*, where these laws are to be found in Appendix II. There the ordinance of 1220 of Frederick II, which was distributed by the glossators under several heads, may be found as a whole.

<sup>2</sup> Cf. Dernburg, *op. cit.*, Vol. I, p. 28.



the succession by the children of brothers and sisters. It was declared that these were — provided that there was no brother or sister of the deceased still living — to inherit *per capita*, and not *per stirpes*.

*Sub-section C. Modern Codes.* — In the various States of the Roman Empire, much was done toward the codification of the law. A large number of codes appeared, in many cases drawn up by distinguished jurists and put forth by the local governments. Thus, in Baden there appeared in 1511 a code drawn up by Ulrich Zasius; in Bavaria, codes were published in 1516 and 1518, and the *Codex Maximilianeus Bavaricus Civilis* in 1756. The *Landrecht* of Würtemberg appeared in 1554, 1557, and 1610; of the Palatinate in 1582, 1611, and 1698; of the Electorate of Cologne in 1663. In Saxony the Constitutions of the *Kurfürst Augustus* were published in 1572, and in the Tyrol a revised code appeared in 1523.

The most important of the codes was the *Allgemeine Landrecht* of Prussia, published February 5, 1794, and which came into force on June 1 of the same year. By this the common law was set aside and the new code took the place held by the Roman Law in relation to the local laws of the various provinces. The following extracts from the patent of publication show its relation to the then existing laws: —

“Art. I. This present general Landrecht shall take the place held until now in our lands by the Roman, the common Saxon, and other alien subsidiary laws; therefore, from the date above mentioned, namely June 1, 1794, no appeal shall be made in any cases coming before courts of law, either inferior or superior, to those subsidiary laws previously in force, but in all cases that may hereafter arise the decision shall be according to the rules of this present Landrecht.

“Art. II. [By this article the general laws of the land which were not expressly repealed were retained.]

“Art. III. The various provincial laws and statutes which have hitherto been in force shall still retain their force and applicability; and this shall take place as follows: the cases that may arise demanding judicial decision shall be judged and decided first of all according to the provincial laws, and in default of provincial laws applying to the case, they shall be decided according to the general Landrecht.”

In Austria was published a general code, the *Allgemeine bürgerliche Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie*. This was published June 1, 1811, and came into force on January 1, 1812. As its title implied, this code was intended for the German hereditary lands belonging to Austria. Except in a very few points, it did not allow the provincial laws to retain their independent position. The new law did not take the place of a subsidiary law, but it was the exclusive source of the private law and almost entirely did away with the local customs and laws.

The method according to which this code was drawn up was as follows: At the command of Maria Theresa, Professor Apponi in 1767 made a compilation for a proposed code. From this Hosten made a condensation, which Von Martini worked up into a law-book. This last work was published and sent to the various universities of the country. A commission was subsequently appointed to take into consideration all the suggestions which were made, and after further discussion the code was published.

The Austrian Code is divided into three parts. The first part is the law of persons, which is treated of in four subdivisions: (1) the rights which are in their nature strictly personal; (2) the law of marriage; (3) the law of parent and child; and (4) the law of guardian and ward. The second part contains the law of things. The first five subdivisions give the law of possession; the sixth, that of pledge; the seventh, that of servitude;

the eighth to the fifteenth, that of inheritance; the sixteenth, that of common rights to things — *Gemeinschaft der dinglicher Rechte*; the seventeenth to the thirty-second, that of contract; and the thirty-third, that of damages. The third part treats of provisions common to the law of persons and that of things; there are four subdivisions, treating respectively of the acquirement, the alteration, and the divestment of rights and obligations, and of prescription.

Of the other German codes, the most interesting is that of Baden, put into force by the edicts of February 3 and December 22, 1809. It was introduced during the period of the French ascendancy, and was a translation of the Code Napoleon, with a few additions regarding institutions peculiarly German. The lands on the left bank of the Rhine generally accepted the Code Napoleon.

The kingdom of Saxony has the Royal Saxon Code of 1863.

The general movement toward codification and the consequent displacement of the common law has had an intimate connection with the survival of the authority of the Roman Law. In fact, as the latter has been the framework, if not the bulk of the common law, so might the German States and provinces in which codes had not been accepted have been called the territory of the Roman Law, or, as a distinguished jurist, Sohm, has expressed it, "the territory of the Pandects." In this district Roman Law was the subsidiary private law, obtaining in all cases where there existed no statute law to the contrary. The whole tendency of modern legal development has, however, been against the authority of the common law, or the Roman Law, as such. The spirit of jurisprudence has been nationalized, its form has become more exact — more straitened to the limits of statute.

The foundation of the German Empire under the lead of Prussia has had profound effect upon the law of Germany,



and especially in the direction of creating a common law for the whole Empire. By a law of December 23, 1873, the right of legislation in all matters of civil law was conferred upon the Empire. The first demand was for public law, and this was met by the four important codifications of 1877, known collectively as the Imperial Laws of Justice. They came into force on October 1, 1879. The Penal Code had been published in 1871, and a general German commercial code, which had been promulgated by the North German Confederation in 1869, came into force as law of the Empire from its foundation.

The great work of accomplishing a complete codification of the private law has since taken place. By a "law of introduction," promulgated August 18, 1896, the new code was published, and January 1, 1900, it became the sole and authoritative law of the Empire. Since the latter date there has been no place left for the Roman Law as the common or subsidiary law. The new code itself is composed only to a very limited extent of material taken directly from the Roman Law, having been chiefly compiled from the Prussian and Saxon Codes. "As to contents, also, the new code distinctly betokens a victory of the national system over the common law of Rome. But these various national or provincial systems have been elevated by the new code to a higher and more complete stage of development. National law, as used in its former narrow sense, has become transformed into imperial law, designed to dominate the life of the entire German people, and subjected in turn to the influence of the nation at large."<sup>1</sup>

The spirit of the new code is distinctly mercantile. It stands to the merchant class in the same relation as the older law to the nobleman and the farmer. "In the code all regulations focus in the private individual, considered in the abstract. It deals with property, family, and in-

<sup>1</sup> R. Sohm, in *Forum*, October, 1899, p. 162.

heritance. Not the farmer nor the nobleman is considered; only the legally eligible subject, the abstract unit of the *jus gentium*, being here in evidence. This unit or person appears in but one capacity — either as creditor or debtor; and this conception may be truly said to embody the highest ideal of the merchant.”<sup>1</sup>

Throughout the new code run two principles: one is the protection of the *bona fide* possessor; the other is the equitable interpretation of obligations. The first of these is designed to facilitate exchange. Except in the case of articles stolen, the *bona fide* possessor acquires complete rights without usucaption. Titles to land are recorded, and the record is sufficient evidence of ownership. The “Certificate of Inheritance” given by a court to the adjudged heir secures the rights of a *bona fide* purchaser as against the rightful heir. The entry in a “Property Register” of a contract as to separate property of husband and wife secures the wife’s property against her husband’s creditors. “Contracts are to be interpreted according to faith and belief; and the debtor is to discharge his obligation in this sense. In other words, the nature and extent of the indebtedness are determined, not by the form of the contract or any other individual circumstance, but by the essential element of justice involved in each case. . . . The new feature here involved is that the code has established faith and belief as the sovereign principle governing all contracts for indebtedness. . . . Not the wording of the promise or contract, but what should be regarded as the inherent substance of it according to faith and belief, is regarded as valid.”<sup>2</sup>

The new code is not, however, the only law of the Empire. It is in itself the law of merchants and of all matters that can be treated from a mercantile standpoint; but there are in force other imperial and provincial laws. The imperial laws are chiefly of an industrial nature; the

<sup>1</sup> Sohm, *l. c.*, p. 163.

<sup>2</sup> Sohm, *l. c.*, p. 168 f.

provincial, of an agrarian nature. By the provincial agrarian laws, not only the agricultural interests, but also vested rights, feudal rights, feoffments in trust, allodial estates, and copyholds, are decided. By the imperial laws governing industrial matters, the interests of labor—which are so often in apparent conflict with capitalistic interests—are regulated and protected. The industrial and agrarian laws have been compared by Sohm to the *jus civile* of ancient Rome, and the laws of the new Civil Code to the Latin *jus gentium*. “The former are of immediate political significance; the latter only indirectly so. Again, our industrial and agrarian laws are primarily designed for our own countrymen (*Jus proprium Germanorum*); the law of exchange, on the other hand, which dominates the Civil Code, being cosmopolitan.”<sup>1</sup>

### SECTION III. — FRANCE

*Sub-section A. Coutumes.*—The history of French Law may be divided into five periods. Of these, the first covers the ten centuries after the beginning of the Christian era. It includes the introduction of the Roman Law, the invasions of the barbarians and the application of their codes to Gallic matters, the rise of the Frankish kingdom, the early Holy Roman Empire, and the beginning of a French monarchy. It is the period in which the law reverted to the primitive form of all law, and became strongly personal rather than territorial. The second period may be roughly defined as extending from the tenth to the sixteenth centuries, and is marked by the rise, in the north, of the *coutumes*, which were territorial as opposed to personal law, and by the revival of Roman Law in the south. The third period comprises the centuries between the sixteenth century and the time of the Revolution, and includes the revival of scien-

<sup>1</sup> Sohm, *l. c.*, p. 170 f.



tific jurisprudence, founded upon the revival of Roman Law, and also the royal *ordonnances* in which the regal power, having attained preëminence in France, attempted partial codifications. The fourth period is that of the Revolution, during which all departments of law themselves passed through a revolution, in which the traditional elements were subjected to a searching examination and the law placed upon an entirely new foundation. This period ended with the completion of the codes. The fifth is that since the First Empire.

The law of the first period has already been examined in connection with the barbarian codes. The introduction of the Canon Law and the capitularies of the Frankish kings and the dynasty of Charles Martel were the principal novel elements introduced after the barbarian codes. Of these, the Canon Law was by far the most important. Its dominance was much longer than that of the others. It became firmly fixed in the minds of all the inhabitants of France. It knew no distinction as to persons, and at the same time it was the first department of law to come under the influence of the scientific spirit of legal study.

The history of French law as an independent system begins with the rise of the *coutumes*. The conditions under which they arose were partly brought about by the intolerable confusion of the personal laws, owing to the intermixture of races existing in France, as well as by the decay of learning which took place in the latter part of the ninth and in the tenth century. In that era, it was considered marvellous for a judge to have complete knowledge of one series of laws; yet a knowledge of all the *leges* was necessary for the correct administration of justice. The only way out of the difficulty was the abandonment of the whole principle of personality of the law, and the establishment of a uniform *coutume* in each district which had any individual life and

0-10  
100-2  
200-  
300-  
400-  
500-  
600-  
700-  
800-  
900-  
1000-

thought. This law of custom was to apply without distinction to all who lived within a designated district.<sup>1</sup>

The basis of the *coutumes* in each district was the law of the dominant race. Little by little the personality of the law was set aside, until in the course of the eleventh century it disappeared. The transition from the personal laws to the *coutumes*, which were territorial in their nature, was greatly facilitated by the indifference displayed to the actual text of the barbarian code under which existence was passed. The law became custom, while at the same time it to a great extent preserved the characteristics of personal law. But when once the idea of an exact written code was abandoned, the territorial custom would easily take the place of personal custom, because of the great superiority of convenience and simplicity inherent in the new *coutumes*.<sup>2</sup>

The second body of law replaced by the *coutumes* was the vast mass of capitularies. Here, however, there was little or no opposition between the two systems. The capitularies had never obtained such hold upon the popular mind as had the barbarian laws. They were not so much the basis of rights belonging to one because he was of a certain race, as they were the restraints and prohibitions issuing from a central authority. In the confusion of the tenth century, they completely fell out of sight, except in so far as the Church preserved such as were important for the support of its claims.

The *coutumes*, in the first stage of their development, were for a long time very restricted in application, and very uncertain in detail. In the first place, they were strictly local, and obtained only in very narrow limits. Although it cannot be said that they were the product of the feudal system, they were partly influenced by it, and their rise was coincident with its own. As feudalism took

<sup>1</sup> Cf. Esmein, *Histoire du Droit Français*, p. 674.

<sup>2</sup> Cf. Brunner, *Deutsche Rechtsgeschichte*, I, p. 255 f.

shape, justice was administered throughout France by a great number of hardly less than absolute sovereigns and the *coutumes* were hardly less numerous than those who administered them. In the second place, the *coutumes* were for long quite indefinite in form. They were passing through a period of transition. In respect to this formative period it has been said that "justice was often administered not only without law, but even without any fixed rule."<sup>1</sup>

The earliest *coutumes* are in general found to be those most restricted in application and briefest in contents. They arose under differing conditions. A lord might be able to compel his vassals to submit to fixed exactions and rules; on the other hand, a community might be able to extort from its lord a charter. A prosperous city might have the power to revise and, to some extent, codify its customary laws.<sup>2</sup> But as a rule the various *coutumes* remained long unwritten. The ascertainment of the law was possible only by a species of jury, which in this case did not find the facts but the law (*inquisitio per turbam*).<sup>3</sup> The members of the inquest did not give testimony before the court, but as a body decided the validity of the claim of a law to be the actual law. In Paris, during the tenth century, there was appointed an official, the *parloir aux bourgeois*, representing the municipality and the citizens, whose province was the interpretation of the local law.

The appearance of the *coutumes* in elaborate and carefully prepared forms took place principally during the thirteenth, fourteenth, and fifteenth centuries. They appear in works of two kinds: *coutumiers*, in which the contents of one or more *coutumes* are recorded; and *livres de pratiques*, in which procedure and practical details, as employed by one or more tribunals, are explained. All,

<sup>1</sup> Esmein, *op. cit.*, p. 675.

<sup>2</sup> Cf. Viollet, *Histoire du Droit Civil Français*, p. 137 ff.

<sup>3</sup> Cf. Brunner, *Die Entstehung der Schwurgerichte*, pp. 84, 127.



however, were private works, without official authority. The four most important *coutumiers* of Northern and Central France are as follows :

1. *Le Conseil à un Ami*, by Pierre de Fontaines, which appeared in 1254-59.<sup>1</sup> This was probably composed at the request of St. Louis, for the education of his son. The object of the author is stated as an attempt to give the customs of Vermandois and the practice of the secular courts. But the greater part of the work is a paraphrase of the Institutes of Justinian.

2. *Livre de Justice et Plet*. This product of the law-school of Orleans may be dated about 1259.<sup>2</sup> It contains the *coutumes* of Orleans, together with a great deal of Roman and Canon Law ; but of these there is proportionately less than in *Le conseil à un ami*. The order and arrangement is that of the Digest of Justinian. In the law of marriage, the decretals of Gregory IX are closely followed.

3. *Les Établissements de Saint Louis*.<sup>3</sup> Formerly ascribed to St. Louis, but now attributed to an unknown author a little later than 1272. It was made up of a number of older collections, especially those containing *coutumes* of Anjou, Maine, Paris, and Orleans.

4. *Les Coutumes de Beauvoisis*, composed by Phillippe de Beaumanoir in 1283.<sup>4</sup> This is not a mere compilation, but—a thing exceedingly rare, if not unique, in mediæval law—a book “absolutely personal and original.”<sup>5</sup> It contains the *coutumes* of the country of Clermont in Beauvoisis, and the author was successively bailli of Clermont, seneschal of Poitou and Saintage, and bailli of Verman-

<sup>1</sup> Published by Marnier, Paris, 1846.

<sup>2</sup> Published by Rapetti in 1850, in the *Collection des documents inédits*.

<sup>3</sup> See Viollet, *Établissements de St. Louis*, Paris, 1881-1886.

<sup>4</sup> “Ici define Phillippe de Beaumanoir son livre, lequel il fist des *coutumes de Beauvoisis*, en l'an de l'Incarnacion mil deus cens quatre-vins et trois.” *Coutumes de Beauvoisis*, ed. Beugnot, Paris, 1842, II, p. 506.

<sup>5</sup> Esmein, *op. cit.*, p. 690.

dois, Touraine, and Senlis. It is a work of the highest legal value. The author was versed in Roman and Canon Law, and was greatly influenced by them — sometimes, it is thought, to the detriment of accuracy as to the *coutumes*. As was the case with the others, this *coutumier* never became an official collection.

The *Coutumiers Normands* occupy a place almost to themselves. They are marked by resistance to the influence of the Roman Law, and by their connection with old customs. Two are especially important :

1. *Très Anciens Coutumier de Normandie*, in two parts, dating respectively about 1200 and 1220. Unlike those which have been mentioned, this was written in Latin.

2. *Grand Coutumier de Normandie*. This is a work of merit almost as great as that of the work of Beaumanoir. It was written in Latin by a clerk who was well acquainted with the practice of the secular courts of his country. His name appears to have been Mancael, and the date of the work seems to have been about 1272.<sup>1</sup> A French translation was very early made from the original Latin, and its popularity was so great that, although it was only a private work, it became so generally accepted as to become hardly less than an official code. For this reason, no official redaction was made until very late (1576–83), and then only because of the difficulty of understanding the ancient text.

Various other *coutumiers* covering many different parts of the country appeared in the thirteenth century. The succeeding centuries produced yet more ; but the great need, as can readily be seen, was that of an official edition of each of the various *coutumiers*. In the middle of the fifteenth century this work was attempted. In 1453 Charles VII, by the *ordonnance Montil-les-Tours*, took

<sup>1</sup> Cf. Brunner, *op. cit.*, p. 127 ff.

steps to publish official codes of all parts of France.<sup>1</sup> But the greatest result arising from the preparation of official *coutumiers* was that the *coutumes* almost immediately became the subject of scientific study. Lawyers at once appeared, who were emulous to surpass the work of the great expounders of Roman Law. With a definite text, it was possible to teach the law in the same manner as it had been taught in the case of the Code and Digest. Commentaries were written, and a beginning of the unification of the *coutumes* of the various portions of France was made. But it was not until the time of the Revolution that such unification was completed.

In this way there came about in France two divisions of the country: that portion where the Roman Law was the common law (*pays de droit écrit*) and that portion in which the *coutumes* formed the common law (*pays de droit coutumier*). To the former belonged all the provinces bordering on Italy, or those first conquered by the Romans and last conquered by the Franks. The principal ones of this number were Guienne, Aquitaine, and Dauphiny, as well as those districts which belonged to the parliaments of Toulouse, Bordeaux, Grenoble, Aix, and Pau.

The rise of royal legislation in France was, on the whole, much later than the same stage of development of jurisprudence in England. The customary law was incomparably more powerful in France; the best evidence of this is the very large number of *coutumiers* which were officially recognized. The royal authority was not sufficient to reduce these to system: much less was it able to introduce any

<sup>1</sup> "Ordonnons et décernons, declarons et statuons, que les coutumes, usages, et stiles de tous les pays de nostre royaume soyent rédigez et mis en escript, accordez par les coutumiers, praticiens et gens de chacun desdits pays de nostre royaume, lesquelz coutumes, usages, et stiles ainsi accordez seront mis et escritz en livres, lesquelz seront apportés par devers nous, pour les faire veoir et visiter par les gens de nostre grand conseil, ou de nostre parlement et par nous les decreter et confermer." Isambert, *Anciens Lois*, IX, 252.



radical change in the law as a whole. Various important royal *ordonnances* were promulgated, however, and these did much toward the introduction of a uniform system, and prepared the way for the great legal reformation in the period of the Revolution.

*Sub-section B. Ordonnances.*—The *ordonnances* may be divided into two periods: that preceding the reign of Louis XIV, and that of the reigns of Louis XIV and Louis XV. A few *ordonnances* were enacted in the fourteenth century; but of more importance were those beginning with that of Montil-les-Tours in 1453, at the end of the Hundred Years' War. This *ordonnance* contained 125 articles. It was a sort of programme of proposed reforms, among which was the redaction of the *coutumes*, as noted above. At the end of the same century a number of *ordonnances* were issued: in 1484, on the States General; in 1494, on the administration of justice, in 111 articles; and in 1498, on the reformation of justice and the general affairs of the kingdom, in 162 articles. In 1539 Francis I issued an important *ordonnance*, that of Villers-Cotterets, on the administration of justice and especially the expediting of the judicial process, in 192 articles. Later *ordonnances* were those of Orleans in 1560, Rousillon in 1563, Moulins in 1566, and Blois in 1579. The last of this early series was the great *ordonnance* of 1629, which was registered by the parliament only after great opposition. In the matter of changes and reforms it was the most radical of all, and this was the cause of the opposition with which it met. Many alterations had to be introduced before it could be passed.

Among the changes caused by these enactments were those in the laws regulating the registration of marriages, births, and deaths. The record in the parish register was the one proof admitted in these matters. This system had been introduced by the Church; it was now regulated

by the State. The law of contract was seriously modified by excluding parol evidence in the case of any contract involving any sum above 100 livres, or any such evidence in interpretation of the terms of a contract, if such interpretation went outside of or was contrary to the context of the instrument. Gifts were required to be made public by entry of the transaction in the public registration office. This regulation was taken from the Roman Law. Trusts, or *fidei commissa*, were greatly restrained, and were required to be made public. The greatest changes made in the law were in the matter of civil, and especially criminal, procedure, by which changes the arbitrary and — as they seem to-day — unjust methods of secret examination, with the attendant perversion of justice, were introduced.<sup>1</sup>

The *ordonnances* of Louis XIV and Louis XV were of entirely different character from those which had been issued in previous reigns. They were codifications, rather than new laws or rules of administration. Each was designed to include and systematically arrange the laws bearing on some one subject, so as eventually to cover the whole field. The importance of these great attempts at codification lies in the fact that through them a uniform law, in certain departments of jurisprudence, was enacted for the whole country, and that in them was contained, not merely the form, but a very large part of the substance of the modern codes.

The inspiration and origin of this new legislative work is to be traced to Colbert, who suggested the plan to be followed. These *ordonnances* were as follows :

1. *Ordonnance civile, touchant la réformation de la justice*, of 1667. This first of all aimed at simplifying procedure and rendering it more exact. It served later as a model for the *Code de Procédure Civile* of 1806 ; the latter, though far simpler and better than its source, shows many traces of its origin.

<sup>1</sup> Cf. Esmein, *Histoire de la procédure criminelle*, *passim*.

2. *Ordonnance Criminelle*, of 1670. The secrecy which had been prominent as a part of criminal procedure was maintained; the accused was not permitted to have counsel; witnesses who contradicted themselves might be prosecuted for perjury; and other stringent measures were adopted, and remained for centuries. This code also became a foundation of the French Code, especially in that portion which treats of the preliminary examination of criminals.

3. *Ordonnance du Commerce*, of 1673. This was a very complete code, drawn up by most careful and experienced commissioners.

4. *Ordonnance de la Marine*, of 1681. This *ordonnance* remained the basis of maritime law, and its influence is still extant in the French Code.

5. *Ordonnance portant règlement sur les Eaux et Forêts* of 1669.<sup>1</sup>

6. *Code Noir*, of 1685, regulating African slavery in American possessions.

Among the *ordonnances* put forth by Louis XIV was one providing for the registration of mortgages. The object of this law was to give publicity to mortgages, so that commercial credit might be improved. As in Roman Law, mortgages had been a private matter between the parties thereto, and by this custom the way had been opened to the perpetration of great frauds. The advantages of the new system were by no means apparent to the nobles who thronged the court of the *Grand Monarque*. In many cases their estates were grievously encum-

<sup>1</sup> The method and purpose of these codifications is illustrated by the preamble to this *ordonnance*: "In order to carry out so useful and necessary a work, we thought that we were in justice bound to obtain a report of all old and new *ordonnances* relating to the subject in hand, with the intent that by comparing them with the views we have received from the various provinces, we might form out of the whole mass a body of clear, precise, and certain laws, whereby all the confusion and obscurity occasioned by those that have been in force may be removed."



bered, and they strenuously opposed any legislation which was calculated to expose this state of affairs to the eyes of the world. The king was forced to repeal in April, 1674, the law which he had promulgated in March, 1673.

The *ordonnances* of Louis XV were promulgated under the inspiration and direction of the Chancellor d'Aguesseau.<sup>1</sup> The intention of these legislative acts was the general reformation of the whole body of law and the production of a complete code of French Law. Several important, though fragmentary, portions of this contemplated work were compiled and published, as follows :

1. *Ordonnance sur les donations*, of 1731. The avowed object of this ordinance was to prepare the way for a general code applicable to the entire kingdom, because "whether by the simplicity of the subject, or because there was little opposition between the principles of the Roman Law and the French Law, this part of the law appeared best suited to be an example of what the proposed plan aimed to accomplish."

2. *Ordonnance sur les testaments*, of 1735. In this the complete unification of the law was not attempted. The *pays de droit écrit* and the *pays de droit communier* were allowed to retain different systems ; but the system of the latter was for the first time made uniform.

3. *Ordonnance sur les substitutions fideicommissaires*, of 1747. The grave abuses which had been permitted, in spite of earlier attempts to control the *fidei commissum*, had produced great distress and inconvenience. By the formation of a trust, property was controlled for an indefinite period after the death of the testator, in defiance of law and custom. The whole system of trusts was not abolished by this statute, but the power of control by the creation of a trust was much curtailed.

4. *L'ordonnance concernant les faux principal et les faux*

<sup>1</sup> See François Monnier, *Le chancelier d'Aguesseau*, 2d. ed., p. 286.

*incidental et la reconnaissance des écritures et signatures en matière criminelle*, of 1737.<sup>1</sup>

These four *ordonnances* were important sources for the French Code, and their provisions were to a large extent incorporated therein under corresponding titles. The last of the four was especially important, being adopted — with only the slightest modifications — in the *Codes de procédure* and the *Code d'instruction criminelle*.

By means of these and other *ordonnances* of minor importance, a large part of the preparation for the formation of a uniform code for the whole of France was ready at hand ; but they were insufficient to meet the demands of the administration of justice. Where the work had not been done, or done only in part, the inconvenience arising from the multiplicity of the laws in different parts of the kingdom became all the more apparent.

*Sub-section C. Modern Codes.*—The demand so persistently made, that the laws should be made uniform throughout France and that the gross injustice in the laws should be removed, found its first definite expression in the decrees of the National Assembly of August 25th and 30th, 1791, as follows :

“Art. 19. The civil laws shall be revised and reformed by the Legislature; and there shall be a general code of laws, simple, clear, and in harmony with the Constitution.

“Art. 20. The Code of Civil Procedure shall be from time to time amended, so that the law may be made more simple, expeditious, and inexpensive.

“Art. 21. The Penal Code shall be from time to time amended, so that penalties may be proportionate to offences ; care shall be taken that they may be moderate, and sight shall not be lost of the maxim forming part of the Declaration of the Rights of Man, that the laws must inflict punishments only so far as these are strictly and obviously necessary.”

<sup>1</sup> *Œuvres Daguesseau*. Ed. Pardessus, Paris, 1818–1820.

The eventual result of this decree was the French Code; but it was not until after the lapse of a number of years, and under widely different auspices, that the most important part of that code appeared. The only immediate result was the formation of the *Code Pénal* which appeared on September 25, 1791, and a *Code des Délits et des Peines*, which was promulgated on the 3d Brumaire, Year IV (October 25, 1795). No further attempt was made to carry out the momentous undertaking which had been planned; the disorganized state of the nation forbade. For a time, the interest of the people was less centred upon the laws by which they were governed than on the defence of the country against invaders. It was only when the military position of France became, under Napoleon, apparently assured, that the abandoned project was once more brought to light and triumphantly carried through.

The law of the 18th Brumaire, Year VIII (November 9, 1799), which created the Consulate, contained a provision that the preparation of a Civil Code should be once more taken up and carried through as rapidly as possible. In fact, the time had come when the undertaking could no longer be delayed; and work was at once begun upon the great code which, next to the Justinian Code, has exercised the most profound effect upon the legal development of the world.

The process of compiling the new code was as follows: On August 12, 1800, the consuls intrusted the task of preparing a Civil Code to a commission consisting of Tronchet, the president of the *Cours de Cassation*; Portalis, the government commissioner at the *Conseils de Prises*; Bigot de Préameneu, the government commissioner at the *Cours de Cassation*; and Malleville, a judge of the same court. These men divided the work among them, each taking a portion of the whole mass of the material. In four months a preliminary report, or first draft, was prepared, printed, and distributed for criticism. The most



important criticism was that furnished by the superior judges. After much private study, the matter was discussed at the Council of State during the following year. Each title was minutely examined by a commission, and in an amended form was discussed by the whole Council of State, under the presidency of one of the consuls. A third draft was then made, and the result was laid before the Legislative Assembly toward the end of 1801; but the opposition to the adoption of the code was so great that the measure was withdrawn on January 4, 1802, and no further step was taken until the following September. Through the persistence of the government, single portions of the code were, during the next two years, laid from time to time before the Assembly, and accepted, with slight modifications, by this body, until the whole thirty-six titles were accepted and arranged in books, and subdivided into chapters. On March 21, 1804, the result was published under the title of the *Code Civil des Français*. After the establishment of the Empire, a few alterations were made, and on September 3, 1807, the whole was republished as the *Code Napoléon*.

The Code Napoleon consists of a preliminary, or introductory, title, and three books. Each book is divided into titles, and these are subdivided into chapters, and in many cases again divided into sections. The chapters and sections are finally divided into articles, of which there are 2281; these are consecutively numbered throughout. All the subdivisions are provided with rubrics, but the citation is generally by the number of the article.

The material used in the composition of this great work was partly the *coutumiers* and partly the *Corpus Juris Civilis*. The most important and largely drawn upon source was the *coutumes* of Paris.

Four other codes owe their existence to the same impulse which produced the Code Napoleon. These were the *Code de Commerce*, the *Code de Procédure Civile*, the *Code Pénal*,

and the *Code d'Instruction Criminelle*. The first of these was undertaken on April 3, 1801, by a commission whose report appeared in the same year. The course followed was much the same as in the case of the *Code Civil*. In 1807 it was accepted as the legal code, and it came into force on January 1, 1808. It is divided into three books, and subdivided into 648 articles. The first book treats of merchants, partnership, sale, exchange, bills, and kindred subjects. The second book treats of admiralty law, and the third of bankruptcy. The sources of this code are, for the most part, two *ordonnances* of Louis XIV, namely : the *Ordonnance du Commerce*, of 1673 ; and the *Ordonnance de la Marine*, of 1681.

The *Code de Procédure Civile* was undertaken by a commission appointed March 24, 1802, and the first draft was presented to the Council of State after having undergone an exhaustive examination by the members of the superior legal tribunals. It went into force on January 1, 1807. It is more elaborate in composition than is the *Code de Commerce*. It is composed of two parts, of which the first is divided into five, and the second into two books. Each book is subdivided into titles and articles, 1042 of the latter in all, each of which is numbered consecutively. The sources for this code were all the older French laws of procedure, and especially the *ordonnance* of 1667 promulgated by Louis XIV, which up to the time of the French Revolution was the principal law of procedure. A number of laws enacted during the period of the Revolution were also taken into consideration and embodied.

The other two codes, which were concerned with the criminal law, although begun earlier than the others, did not come into force until after the codes governing civil and commercial matters. They were not enacted until 1809 and 1810, and did not come into force until January 1, 1811. They have not exercised the same widespread influence as have the others.

Though the introduction of the Code Napoleon in foreign countries was at first the result of the French conquests, yet it was eagerly accepted by the peoples who came under French dominion. In spite of its numerous and serious mistakes — which, as in the case of the great Justinian codification, were the result of haste — it was in many respects far in advance of any system in general use. Its spirit was far more liberal than that of any other code, and the many feudal and traditional restrictions and burdens which were everywhere else maintained in full force were in France annulled by the new system of law.

The Code Napoleon was adopted by Switzerland, Italy, Sicily, Belgium, Poland, several German provinces, and by all the Latin races in America. In some of the countries by which it was adopted it has since been superseded by other codes ; but it has remained a fundamental component of the laws of the German lands, as well as of Luxembourg, Belgium, the Canton of Geneva, and a portion of the Canton of Berne. In Holland and Italy it has been supplanted by new codes modelled upon it. A new redaction was made in Holland in 1838, in Italy in 1866. In 1865 Roumania adopted it with various modifications.

#### SECTION IV. — SPAIN

The reception of the Roman Law in Spain differed from that accorded it in other European countries. In some ways it resembled the reception of the Roman Law in England, although the extent to which that law influenced the law of Spain was far greater than its effect upon English law. It was never received in Spain, as in Germany and Scotland, by a formal Act of Legislature. In fact, almost from the first there was strong protest on the part of the Government against the use of the Roman Law within the kingdom. But as there existed a learned judiciary and a trained legal profession, the superior scientific accuracy of the Roman Law insured its reception.



There existed also the constant influence of the Church, as well as of the universities which were founded in imitation of those of Italy. In these the Roman Law was exclusively studied.

The prohibition of the use of the Roman Law in the early legislation of Spain was repeated by many monarchs. Many jurists have strenuously denied the applicability of Roman Law to the kingdom of Spain. Although King Alphonso the Wise incorporated in the *Siete Partidas* many laws of purely Roman origin, he declared his wish to banish all Roman laws from his kingdom. These *Siete Partidas* themselves refute any claim that they are of native origin; and in their expositions of the law the Spanish lawyers were indebted not only to the form of Roman Law, — which indeed might be a mere matter of convenience, — but to that law itself for the very substance of their works.

The legislation of the Spanish kings, however, has incorporated within it so much of the Roman Law, and is really so dependent upon it, that citation of any part of that law not included in the *Partidas* and *Recopilacions* is rarely necessary. In this way, Spanish legists have transferred into their working system large parts of that law which they have officially banished. This will not seem remarkable when it is remembered that until 1713 Spanish law was not allowed to be taught in the universities, only Roman Law being taught. The effect was of course the same as in Germany. The educated lawyers were thoroughly grounded in the Roman Law, and interpreted all law in accordance with its principles. The new laws have been composed according to its teachings; though the formal acceptance of the Roman Law as a subsidiary law has never taken place. This is the truth which dwells in the persistent denial of the binding force of the Civil Law. The same denial is made respecting the Canon Law; but the canonical jurisdiction was retained.

and, in a multitude of cases, the principles of the Canon Law were carefully embodied in statutes.

But although the Roman Law is the foundation of the law of Spain, the result of the use of the principles derived therefrom has been much the same as in Scotland.<sup>1</sup> There has always been a strong executive, whereby the royal laws have been able to modify the generally received legal principles and in part, though only in minor matters, supersede the rules of the Civil Law. The legal writers have thus been able to build up a mass of law purely Spanish, as far as the immediate source and authority thereof is concerned. This law has become by usage the law of the land, even when it has not been embodied in statutes.

A good illustration of the Spanish standpoint may be found in the *Institutes of Asso and Manuel*,<sup>2</sup> a work which has enjoyed in Spain a popularity as wide as Blackstone's Commentaries have had in England. In the introduction to their work, these eminent jurists are very careful to deny the authority of the Roman Law in the absence of Spanish law. Their intention seems to be to show that the Spanish law is not dependent upon the Roman Law; yet the whole work is a constant contradiction of the principles stated in the introduction, at least as far as independence means "abstaining from citing the laws of the Roman Code, proving every proposition by only our own suppletory law, and supporting those propositions which our laws do not express, and the knowledge of which is necessary, by the authority of only our native and classic authors."<sup>3</sup> It may be unnecessary to point out that all this is quite possible, and yet the law be dependent upon the Roman Code. The nationality of writers

<sup>1</sup> See Section V, *post*.

<sup>2</sup> *Institutes of the Civil Law of Spain*, by Doctors D. Ignatius Jordan de Asso y del Rio, and D. Miguel de Manuel y Rodriguez. Tr. by Lewis F. C. Johnson, London, 1825.

<sup>3</sup> *Op. cit.*, p. xx.

has little to do with their law and its origin. But there are not wanting legal writers who assert that the Roman Law has in Spain the force of common law. From the standpoint of Historical Jurisprudence, there is but little difference between a formal reception of the Roman Law and the incorporation of that law without acknowledgment.

#### SECTION V. — SCOTLAND

During the two centuries following the Norman Conquest, the law of England and that of Scotland contained many essential features in common. The influence of the Normans upon England and English law was hardly greater than that which they exerted upon Scotland and Scottish law. That which in the south they accomplished by force of arms, in the north they accomplished by settlement. By dint of energy and persistence, they obtained possession of much of the land in the Lowlands. Everywhere they held the great estates, and their law superseded that of the natives.

In the first two centuries of the Norman settlement, the Scottish king aimed at the establishment of royal courts, modelled upon those of the south. Writs were issued in very nearly the same form. So great was the general similarity that, were it not for the difference in name, the writ in force in Scotland might have been issued by an English king. The germs of the jury system were to be found in the procedure of the country. But the subsequent course of law in the two kingdoms was utterly different. The strong, centralized government of England was not reproduced in Scotland. The courts which gave form and direction to English law found in the north no counterparts which were capable of bringing into existence a body of common law, as a body of unwritten law binding upon the whole kingdom. There were indeed royal, as well as local courts. But the royal courts were



connected with the king's presence, and moved about the country with the king's person. The relation between the royal and the local courts was not clearly defined, and the right of appeal was uncertain. The establishment of the Court of Sessions in 1523 came too late to accomplish the work which had been done by the King's Bench and other courts at Westminster. The rapid social changes which took place in the sixteenth century made impossible such a natural evolution of the law as had taken place in England. In Scotland the law grew by additions from without, rather than by developments from within.

The difference between the two judicial systems resulted in the Roman Law holding in Scotland a very different position from that which it held in England. In the latter country, the time of the greatest influence of the Roman Law was during the mediæval period; and it became known to the English lawyers in the form in which it was taught in Bologna. By its study, the English lawyer was enabled to understand and interpret his native law, and was guided in the arrangement of his text-books and other legal treatises. But it was accepted by the courts only by way of illustration, and from the year 1388 it might not be cited at all. In Scotland its career was very different. No trace of the Roman Law is to be found precedent to the fourteenth century; and that which appears in the *Regiam Majestatem*, which was composed in the beginning of that century, seems to have been introduced principally as ornament. In the succeeding centuries, the ecclesiastical courts made some use of the Roman jurisprudence; but the principal cases were carried by appeal to Rome, and the scientific study of the Canon Law, as well as that of the Civil Law, was no more stimulated in the northern than in the southern part of the island. The application of Roman Law in these ecclesiastical courts was confined to their peculiar

jurisdictions ; it did not affect the general judicial system of the kingdom.

The reception of the Roman Law in Scotland was due to causes similar to those which introduced that law into Germany. As a class of professional lawyers arose to take the place of the unlearned administrators of the law, Civil Law made its way. In Scotland, the feudal system of administering the law had held its place for centuries. The right to hold court was hereditary, and the sheriffs holding the county courts were not of necessity men learned in the law. In fact, there existed but little law ; and that little was crude and suited only to the simplest cases. But with the revival of learning at the period of the Renaissance, there arose a professional class devoted to the study of law. Lawyers were almost invariably trained on the Continent, where they were taught the only form of jurisprudence which obtained in the universities. For a long period before the sixteenth century, the custom of studying in the Continental universities had obtained in Scotland, and, at several of those universities, colleges were founded for Scots. In the early years of the sixteenth century a large number of Scotch students held distinguished positions at Pavia, Bologna, and elsewhere. To these students the Roman Law was presented as the *lex generalis omnium*. It was presented to them as the law of antiquity, binding everywhere and always. They were taught that just as the Bible contained all religious knowledge, and the works of Aristotle all philosophical knowledge, so the *Corpus Juris Civilis* contained the sum and substance of all legal knowledge. Whatever else was known as law was merely local custom, deserving scant respect or credit. It was to be interpreted only in the light of the Roman Law, which was the embodiment of all reason and equity.

When the Court of Sessions was established, the professional lawyer was placed upon the bench beside the

hereditary officers of the court, the "extraordinary lords." He was able to obtain full authority, and he administered the law with the aid of his professionally acquired skill. The local courts were affected in the same way. The magnate to whom had belonged the right of jurisdiction was forced by public opinion to employ a trained legal assessor, or to appoint such as deputy. Not until 1748, however, did the complete change come, whereby the professional lawyer was left alone upon the bench.

At the time of the institution of the Court of Sessions there was no native law which might be employed in governing its decisions. The student of law affected only the foreign systems; the need was imperative, and the Roman Law was at hand as a complete system to supply the want. Its triumph was immediate and complete; and it became the Common Law of Scotland as it had earlier become that of Germany.

By the seventeenth century, the Roman Law had become completely incorporated with the Scotch Law. Arthur Duck, in his treatise on the Roman Law,<sup>1</sup> points out that the law of Scotland<sup>2</sup> consisted in the first place of the customs of Scotland contained in the *Regiam Majestatem*, and a relatively small body of statutes. "After this municipal law of Scotland, the Scots apply the authority of the Civil Law of the Romans; since John Skene testifies that the Scots had borrowed from the Civil Law their judicial forms of process and pleadings, and most of their other rules in municipal law. The glosses on the written laws of Scotland are all prompted by the Civil Law of the Romans. In those things which in the written laws of Scotland are laid down contrary to the Civil Law of the Romans, the Civil Law yields; but where the municipal law is defective, and in omitted cases, the

<sup>1</sup> *De Usu et Auctoritate Juris Civili Romanorum in Dominiis Principum Christianorum*, 1653.

<sup>2</sup> *Consuetudines Scotiæ*.



judges among the Scots are not left to follow their own arbitrary opinion, but are bound to judge according to the Roman Law. And accordingly this opinion has prevailed among foreign nations, that the English settle law-suits solely according to their own law, but that the Scots, like the other nations of Europe, use the Roman Law."

The growth of Scottish law since the reception of the Roman Law has been in the direction of a native system. This was chiefly brought about by the growth of a body of Scottish precedents, which rendered unnecessary the constant appeal to the *Corpus Juris Civilis* and the great commentators thereupon. The Court of Sessions did not look with favor upon appeal to the Roman authorities in questions which had been settled in that very court. The judges resented what seemed to them a disregard of their decisions. Appeal to Scottish precedent thus became increasingly prevalent in legal practice.

A second cause for the appearance of a native legal system, as opposed to one entirely Roman, was the increase in the number of statutes enacted in Scotland. A few decades after the reception of the Roman Law, the crown of Scotland became united to that of England, and the position of the king was greatly strengthened. The small body of statutes was rapidly enlarged, and though the legal principles of the Civil Law were much used in the exposition of the new statutes, yet these formed an important constituent of the national law. The native element in the law was emphasized by the new enactments, and the lawyers became accustomed to appeal to native custom and precedent.

A third cause for the change in the legal system of Scotland was the influence of English example, and especially, after the Union, the new Supreme Court of Appeal. The English law presented a great number of principles which were in close touch with modern conditions, amid which

that law had grown to maturity. It had long been neglected by the Scotch; but its completeness, its clearness, and its adaptability could not be entirely overlooked when the two nations were brought into close relation. The Scotch judges were encouraged by the example of their English brethren to develop the principles of their native law rather than slavishly to follow the Roman rules. After the Union, the judges of the Court of Appeal were very generally wholly ignorant of the Roman Law, and were unwilling to attempt to master its principles. As far as they could, they followed principles which had been established in Scotland, supplementing them by the English Common Law and Equity.

Finally, the rise of modern commercial customs, which only with great difficulty could be treated according to the principles of the Roman Law, forced the Scottish jurists to attribute less importance to the Civil Law and to depend more and more upon native precedents, founded upon equitable consideration of the new cases which were continually arising.

The lawyers of Scotland have of late made comparatively little use of the Civil Law, having studied it only as an introduction to the Scottish law proper. It is many years since the Roman Law has been cited in any important case, and the references made thereto are generally by way of embellishment. Scotland is as much a land of case law as is England; and although Scots law differs from English law in a very large number of points, its line of growth is much the same.

The legal literature of Scotland, until well into the eighteenth century, does not show trace of the influences which were effecting little less than a revolution in the Scottish law. In the early period of Scoto-Roman Law Sir John Skene and Sir Thomas Craig might regret the absence of native law and declaim against the monopoly enjoyed by the Roman Law; yet their books are filled with foreign

jurisprudence, the native law being wholly insufficient. Sir George Mackenzie's *Institutions of the Laws of Scotland*, written about 1684 and long a favorite text-book, treats the law in the order of Justinian's Institutes. Lord Stair's *Institutes* are dominated by the influence of the Civil Law, and the *Institutes* of Erskine are on the same plan as those of Justinian. Toward the end of the eighteenth century, the text-books of the institutional writers show an increasing tendency to belittle the Roman Law and to conform to the practice of their own courts.



## CHAPTER XVI

### EARLY ENGLISH LAW

#### SECTION I. — BEFORE THE CONQUEST

IN certain aspects, the history of English law resembles that of the Roman Law. Its duration has been almost as great, and in extension of application at the present time, English law is second only to the Civil Code. But the history of the former is far less simple than that of the latter. The causes which influenced its development have been more numerous and less connected with the essential principles of legislation. Until the time of the Justinian codification, the Roman Law was the work of one people. The principles contained in the earliest legislation—the Twelve Tables—were developed and continued through the whole period of purely Roman history. The legislation—whether *jus gentium* or *jus civile*—which modified the ancient law, was Roman law, introduced by Roman officials and deriving its inspiration and force from the Roman people.

The English law, on the other hand, was originally the law of a body of invaders. The great modifications introduced from time to time were less the natural and spontaneous development of inherent principles of that law, or of authority recognized by that law, than importations from other systems. These systems might originally have had much in common with the law of England; but they had passed through experiences entirely unlike that of the latter, and had in many cases attained to a high degree of perfection before they were incorporated into English law.

The first form of law which — at least within historic times — prevailed in England was undoubtedly Celtic. Of that law no recognizable traces remain in the present law of England. There are indeed many points of resemblance ; but these are no proof of the survival of the old forms, since these forms are also to be found in other systems, and in the great stock of Aryan law generally.

The second form of law which prevailed in England — that which completely supplanted the Celtic laws, except in the most remote and inaccessible portions of the island — was the law of Rome, introduced at the first conquest of England within the historic period. Of this body of law also there remains little or no ascertainable trace in the law of England. The subsequent invasion by the Anglo-Saxons was able to efface nearly, if not quite, all vestiges of Roman language and institutions. The little of Christianity which survived retired to the wilds of the extreme west and north. The religion, the language, and customs of the invaders, held undisputed sway. The subsequent appearance of Roman legal institutions was due to events wholly unconnected with the Roman occupation, and may be assigned to definite events and epochs in later history — to the reintroduction of Christianity by St. Augustine of Canterbury, in which the Roman element was merely ecclesiastical ; to the intercourse with the Frankish court, especially at the end of the eighth and beginning of the ninth century ; to the Norman invasion, in which Roman elements, both ecclesiastical and secular, were to a limited extent introduced ; to the revived study in the twelfth century of the Roman and Canon Laws, which study extended from Italy throughout Western Europe ; and finally to the rise of equity jurisprudence.

English law may therefore with strict accuracy be said to have begun with the Anglo-Saxon invasion. The history of the English system prior to that time belongs to the Germanic law on the continent of Europe. In study-

ing the history of Anglo-Saxon law, the attention is constantly attracted by the strictly Germanic character of its leading principles. The common stock of non-Roman law which appears in the barbarian codes was fully reproduced in England. Furthermore, the development of that law in the latter country was more consistent, and was unmixed with the law of the conquered race. With trifling exception, there were no legislative innovations, and the only non-Germanic element in the legal system was the provision made for the Church and its officials. Here, indeed,—except in so far as it related to matters distinctly spiritual,—the ecclesiastical law was included in the principles generally in force.

The common Germanic conception of the family, as composed of the blood kinsmen, lay at the foundation of much of the Anglo-Saxon law; and the relation of the family to the individual was a characteristic of many legal provisions. Among the small groups founded merely upon kinship, the conception of the State was at the time slowly rising, but the traces of an earlier system were everywhere abundant. There was not the strict subordination to the house-father which was characteristic of the earlier Roman family. The young man attained his majority at an early age, and was then enrolled among the freemen. The whole body of kinsmen were held together by common interest and common duties. Among these was the duty of taking vengeance for the blood of a kinsman. To the kinsmen was paid the weregeld in cases of homicide. They were responsible for the conduct of the members of the family. Yet the family was not a definite body as was a tribe or clan, for the relatives on the side of both parents were included among the number of kinsmen.

Men might be classed as free, half-free, or slaves. The first class consisted of ceorls and eorls. The former were the unprivileged freemen; the latter were noble by



birth. Of great importance among the eorls was the *gesith*, who was a companion of the king and might be thought to have been ennobled by service, were it not that only eorls were eligible to the position. In the time of Alfred, the name of *gesith* became obsolete, *thane* being substituted; the two titles originally denoted the same conception, that of one attached to the person of the king. But herein lay the difference: the former was noble by birth, the latter ennobled by service. The thane attached to the king took the place of the *gesith*, and was known as a king's thane; he enjoyed a higher rank than other thanes, as determined by the *weregeld*. For the most part, the position of the thane was that of a landed proprietor of superior birth and enjoying superior rights. His *weregeld* was six times that of the simple freeman, and in a wager of law his oath was equivalent to that of six freemen. These really important privileges could be claimed by him who had five hides of land (about 3000 acres), a church and belfry, a borough-gate-seat, and a special place in the king's hall.

In the lower classes, the *læte*, or the half-free, who appeared in early Germanic law, disappeared before the end of the ninth century. There remained the slave, or rather the serf, who was a slave and yet was not wholly without rights. The owner of the slave might not kill him without thereby incurring a fine, payable to the king; and, as in the Hebrew law, the slave gained liberty if his master struck out his eye or tooth. The landless man was in every case dependent upon a superior, or lord, and the lordless man was an outlaw. The *ceorl*, as was natural in the existing state of society, was for the most part engaged in agriculture.

This constitution of society was the basis for the *weregeld*, which in England became highly technical and complex. It was the sum at which was valued the life of a man, and which, in case of death by violence, was to be

paid by the slayer. The weregeld varied in amount for the different members of society, ranging from that for the simple freeman, of two hundred and sixty-seven thrymsæ (£4 9 s.), to that for the king, of thirty thousand thrymsæ (£500). The object of the weregeld was to limit private vengeance; but its chief result was a more complete organization of the courts and a rudimentary distinction between civil wrongs and criminal acts.

The courts of law were the king's court and the local courts. These latter did not derive their authority from the king, who was at no time in this period regarded as the sole fountain of justice. These lower courts, which were survivals of the older Germanic tribunals, were, first, the village-mote; secondly, the hundred-mote, presided over by the ealdorman, held every four weeks; thirdly, and superior to the hundred, the shire-mote, which was held twice a year. In these courts the administration of justice was of a popular character, and the authority to enforce decisions was very feeble. The most effective weapon against the contumacious was outlawry, whereby the criminal was set outside the protection of the law and might be killed as an enemy or wild beast. The king's court was not only the court of the king's men, but also a court of appeal, to which might turn those who could not obtain justice in the local court. This court had no fixed abode, but followed the person of the king in his travels through the kingdom.

Toward the end of the pre-Norman period, the rise of private jurisdictions may be observed. The king's prerogative of hearing cases was, under the name of "sac and soc," extended to many of his subjects. Thus was created an inferior species of court, which derived its authority from the king. The development of these lower courts belongs to the Norman period; for the changes then made were in the nature of adaptation rather than innovation.

The method of procedure in the courts was the same as that used in the country of the Teutonic invaders. The affirmation of compurgators was the normal method. These oath-helpers were not witnesses to the facts alleged, but were called upon to state their belief that the cause of the party whom they thus aided was good. The required number of oath-helpers, or compurgators, depended upon the gravity of the offence and the rank of those who offered their oath.

The most common offences were homicide, assault, and theft—as was to be expected in a primitive civilization—and many of the laws which were promulgated from time to time referred to the amount of fine required as compensation for injury. Homicide was treated as all other offences, the rate of compensation being regulated by the rank of the person slain. The distinction between accidental and intentional homicide was generally overlooked, and the weregeld was awarded in order to put an end to the blood feud. The chief distinction made between the kinds of homicide was that between secret and unexpected attack—as from ambush or by poison—and open assault. In this connection appears the same idea as in the Roman law of *noxæ deditio*; the weapon causing the death was surrendered to the kinsmen of the slain. (This was a primitive notion which was common to many nations.<sup>1</sup>) In the case of the killing of a stranger—that is, an alien or inhabitant of one of the other petty kingdoms—two-thirds of the weregeld was paid to the king.

Compensation for bodily injury was graduated according to the member of the body which was injured—as in the Continental barbarian codes—and the responsibility for injuries extended to ownership of the weapon used in the assault. The fact that a certain weapon had been used was *prima facie* evidence that the assault had been made by the owner of that weapon.

<sup>1</sup> Cf. Tylor, *Primitive Culture*, Am. ed., I, p. 285 ff.



In the case of theft, the custom of selling everything in the presence of witnesses became of importance, since irregular acquirement of goods was in itself a suspicious matter. The thief was required to make restitution of the stolen property; if unable to do this, he became the slave of the person from whom he had stolen, until he had worked out the value of the goods. His family might also be reduced to slavery; but his wife could save herself from this fate by establishing her innocence of complicity.

The distinction between ownership and possession was not carefully made. Transfer of property was of the simplest character, mere delivery in the presence of witnesses being sufficient to constitute a valid sale. But the vendor had to guarantee that the property had not been stolen. In case of the sale of cattle, if the purchase was not made in open market before the usual number of witnesses, the purchaser was liable to loss of his property, should it be claimed by one from whom it had been stolen. From the necessity of proving ownership arose the custom of warranty, whose developments and analogues appear in such prominence in modern law.

Throughout the centuries from the first Teutonic invasion (449) to the Norman Conquest (1066) the development of land tenure kept pace with the needs of the nation. As the nation became larger and the wants of its members more complex, the changes in the law of land were quietly and advantageously effected.

In the invasion the procedure of land division may have been somewhat as follows:—

The elected war-chiefs of the people met in council with the leader of the entire host. After this leader, whatever may have been his title, and his immediate staff, or chiefs of division, had received such areas as they chose from the newly acquired territory, such portions of the conquered land as were proportionate to the number of warriors or families in a hundred were given to these

subdivisions of the army. Each was given to the subdivision as a unit, and by it, in the manner sanctioned by its tribunals, was divided among the families which were represented in that subdivision.

While the term "hundred," or "pagus," of which we have just spoken, has not been conclusively defined, it is generally understood that it was at first applied to a hundred warriors. The whole host, or people-in-arms, was divided into hundreds of warriors interunited by real or supposed bonds of kinship. These warriors probably came from the same neighborhood. In the course of time, the term "hundred" lost its primary significance, and came to be applied to the people — that is, to the families supplying the hundred warriors. Later, yet another change occurred in the terminology. The hundred then signified the locality or definite area from which the hundred warriors were furnished to the host. Finally, it lost its connection with military matters, and became an administrative district. In other words the term was at first personal, then territorial.

When the apportionment of land was concluded, the families composing the hundred were found grouped in towns or villages, in a manner nearly, if not quite, identical with that of the Teutonic form of settlement.

The main feature of the old Germanic communal organization was that known by the name of "the mark." The philological accuracy of this use of the word need not here be discussed, as the term has become indissolubly connected with the system of land tenure known to have existed among many Germanic tribes.

In the mark division each freeman was assigned a determinate portion of ground upon which to build his house and establish his various domestic offices. This land was the separate and individual property of the head of the family, and was held without dependence on any man or body of men. The possession of land was of much greater im-

portance at that time than now, "for it was the basis of political distinction and constitutional right."

The arable land remaining in the township after the residential allotment had been made was divided into three fields — or, to speak more precisely, portions — one of which was to lie fallow each year. The yearly use of a share in the arable land, together with a share in the meadow or hay land, was assigned to each freeman. All freemen enjoyed rights of common pasture and could use, under customary restrictions, the woodlands and their products. After the various assignments of land had been made, there still remained more or less which lay in the limits of the township or hundred as well as between the various townships or hundreds. That part which lay within the limits increased as the boundaries of the nation were enlarged by further conquest and consequent dispossession of the inhabitants. The second division, on the other hand, continually decreased, being appropriated by, or granted to, individuals.

With the passage of the years, the movement of the population and the increase of power in the central government brought the isolated townships into closer touch with one another, and the land lying between the towns was appropriated by the great lords. The mark system failed to maintain itself, and the common land became the land of the lord or of the king. With the exception of a very few remnants, common land disappeared. With the restriction in use of land, the relation held thereto by the freeman assumed another form. From being the independent possessor or holder of land, he became, either from need of protection or from poverty, dependent upon some one more powerful than he.

The Anglo-Saxon land system divided the land into two great classes: common land, or the land of the community, and the land of the individual. The common land was that on which the community pastured its cattle and



sheep, where its swine fed upon mast, and from which its members took house bote, fence bote, plough bote, and other necessary wood. This waste land was regarded as the common property, from which grants could be made; it might be called the people's land, but it was later regarded as belonging to the royal treasury.

The land held by the individual was divided into folc-land and boc-land. Folc-land was held by title of customary law, as distinguished from a specific grant or written title.<sup>1</sup> This folc-land was held by tenure derived from the ancient German land law. The theory that it was land held in common is not warranted by the evidence, and the distinction between folc-land and boc-land lay in the form of right by which the individual possessed the land.<sup>11</sup>

The term "folc-land" occurs but rarely in the manuscripts, and its modern use comes from the convenient—though, as it has proved, misleading—comparison with boc-land. Other terms which were employed to designate it were *erfland*, *erbland*, family land, *heirland*, and *ethel*. As some of these names imply, it belonged to the family, not to the individual. The individual lived upon it and enjoyed the usufruct; but he could not permanently alienate it, either *inter vivos* or by testament, without the consent of all interested in it.

The second class of land owned by individuals—and this term must be understood as including corporations, such as religious houses, as well as persons—was land granted by the king and his Witan, and later, perhaps, by the king alone. The act of granting the land was recorded on a piece of parchment, or *boc*, which was signed by the king and those members of the Witan who happened to

<sup>1</sup> Cf. Vinogradoff, *Folk-land*, *English Historical Review*, VIII, 1-17; also Pollock and Maitland, *History of English Law*, Cambridge, 1895, I, p. 38. See to the contrary, Digby, *History of the Law of Real Property*, 4th ed., Oxford, 1892, Part I, chap. I, *passim*.

be present when the grant was made or when the draft of the grant was presented to the Witan for ratification.

This boc, or evidence of title, was delivered to the grantee. From it the land received the name of boc-land, or book-land. (It must not be imagined that these boccs were drawn after any uniform legal style or well-established precedents. They were, on the contrary, very loosely constructed, and in most cases were the work of the grantees themselves.

Folc-land had four marked characteristics : —

1. It was the creation of customary law.
2. It was an estate of inheritance.
3. It was based on family and subject to certain rights of the family.

4. In origin and theory it was liable to no public burdens except the *trinoda necessitas* : —

- (a) *Arcis constructio*.
- (b) *Pontis constructio*.
- (c) *Expeditio*.

That is to say, the repair of fortifications and bridges, and the defence of the State.

The only mode of transfer was by descent or reversion to the State; this reversion was not escheat. As the bonds of the family and township loosened there probably followed these steps : —

1. Alienation only within the family, but only with the consent of possible heirs as well as of the community.
2. Consent of the community became needless.
3. Consent of family grew to be unnecessary, and transfer to strangers became possible. While such transfer, in all probability, was at first by a delivery with the accompaniment of some possessory symbol, it was at a later time accomplished or evidenced by means of writings, or boccs.

The distinction between folc-land and boc-land gradually became confused. We find an approximation of conception, that was rendered more complex by the tendency to

use synonymously the terms folc-land and allod. Then the term allodial, from its first meaning of independent ownership, the subject of free disposition *inter vivos* or by will, came, as is proved by documents which have been preserved, to mean land which would descend to heirs.

Allodial land was generally held free from all burdens. Its owner was under no obligation to render either money payment or services to any one. He was only liable to the *trinoda necessitas*, to which all landowners were liable and all land was subject. The owner of an allod could grant the land to any one in his lifetime, or he could leave it by will; if not thus disposed of, it would descend to his heirs.

The question naturally arises as to what rights he could grant during his lifetime in land held allodially. It has been concluded that

1. He could grant the fee simple.
2. He could grant the estate, but with the proviso that it should descend to particular heirs of the grantee, *i.e.* to his son or sons by a certain wife.
3. He could grant a life estate, either for the life of the grantee or that of another, with reversion to grantor or another.
4. He could grant the estate for a term or terms of years, with reversion as he pleased.
5. He could suffer a person to remain on the land for an indefinite period.

The allod was the highest type of ownership in land. The next was the beneficial enjoyment of common land.

Any person holding either of these estates could in his turn grant to another the beneficial enjoyment of such land on such terms as might be agreed between them. At the expiration of the grant the land would revert to the grantor, unless other agreement had been made. Land thus granted or let was called *laen-land*, and it



was held on various terms, such as agricultural services, suit at court, or money rent. In the earliest grants of this laen-land, and perhaps in grants of usufructory boc-land, are to be found the elements of pure tenure.

The important contributions of Anglo-Saxon law to the land law of England are in general four.<sup>1</sup>

First, the conception of tenure as developed in boc and laen-land.

Second, the conception of the duration of an interest in lands; an interest which could descend to successors *ad infinitum*, as noted in the case of folc-land. Out of this grew the idea of limiting estates to particular descendants. Estates for life were also known as leased lands.

Third, the freedom of alienation *inter vivos* and by will, which is characteristic of boc-land.

Fourth, the descent of land according to the rules of local custom upon the death of the land-holder.

These four principles, after varying fortunes and centuries of conflict, often of defeat, stand unquestioned among the elemental postulates of English law. <sup>n</sup>

The frequent changes in the political conditions of the country exercised but little effect upon the prevailing system of law. The fundamental principles remained the same. The ruler of one petty kingdom, such as Wessex or Mercia, was of the same stock as the ruler of the others, and held similar notions of justice and law. The law-courts of the various kings differed but little in detail. There were no great legal codes to be imposed upon a conquered country. Even the Danish invaders and their kings introduced little that was novel, and few changes were made by them in the legal system of England. In fact, nearly all the changes which have been attributed to the Danes may be assigned "almost with equal certainty to the distinction between Angle and

<sup>1</sup> Digby, *op. cit.*, p. 29.

Saxon.”<sup>1</sup> The Danes were not in a position to bring about the introduction of many important matters characteristic of their own country. Furthermore, the Danish customs were a part of the general Germanic stock, or so closely resembled it as to make acceptance of these customs easy. The Danish occupation, although accompanied by the dispossession of many land-holders, was not followed by extermination of the inhabitants, as was the Anglo-Saxon invasion. The Danes, indeed, coalesced to a marked degree with those whom they found in possession of the country. The slight peculiarities of their own law were doubtless at first retained as a privilege of the conquerors, and the importance of the Dane in the eyes of the law was a characteristic mark of the right of the newcomer. But the personal distinction rapidly disappeared, and the law, in the part of England held by the Danes, soon became one for Danes and Englishmen alike.

The law of England grew under both Anglo-Saxon and Danish monarchs, but rather by way of sharper definition of local custom and precise ruling as to the administration of justice than by addition to the principles which were applied. During the latter portion of the period immediately preceding the Norman Conquest, the position of the king, in spite of numerous disputes, became more firmly established. The king's peace became a factor in the law. The offender against that peace was liable not only to a fine to be paid to the injured party, but also to punishment for the further offence. Under the Danes, as under the Saxons, outlawry was extensively employed as a method of enforcing the decrees of the court. The defendant who was adjudged guilty and who refused to pay the fine was declared beyond the protection of the law. This was indeed an element of law common to many, if not all, Teutonic tribes.

<sup>1</sup> Stubbs, *Constitutional History*, I, 197, 77, Oxford, 1875.

## SECTION II. — THE NORMAN PERIOD

The Norman Conquest was in many ways the turning-point in the history of English political and legal institutions. Its way had been already cleared by the changes which had occurred in England prior to the coming of William ; but a surprising amount of English law survived. The conditions through which the Normans had passed in the century and a half preceding the invasion had clearly and rapidly developed the legal system which was involved in the political system peculiar to the times. In France and Normandy the royal office was slowly developed from that of the mere leader in war. The superior power concentrated in the hands of one man, who administered the law with the help of a council, was a necessary step in the evolution of any fixed form of government. The first step toward the establishment of royal authority could be taken only by the subordination of all other leaders to one, as the source of all authority and honor. The ruler's province was to administer justice ; to be responsible, in virtue of his office, for the peace and welfare of his country ; and to give laws to his people.

The one great means whereby the royal power was first clearly established, after the confusion of the Dark Ages, was the feudal constitution. In this every member of the political society, from king to peasant, was arranged according to a definite scheme. The duties owed to one another by the various members of that society were clearly determined and well understood. The underlying principle of the system was that of land tenure. Every acre of land was held from a superior, until the vast network at last centred in the king, who was regarded as the original and paramount proprietor of the whole land.

The development of the feudal system as an institution of Western Europe was distinctly of Frankish origin. It has appeared elsewhere in history, in places and ages as



far removed as Ancient Egypt, the Mohammedan Empire, and even modern Japan until 1867. The seeds thereof were sown in England in the time of the Anglo-Saxons; but the conditions under which it was at last definitely established were of Frankish birth. Its highest form was not attained in early England, because of the continuance of the Teutonic system of land tenure in that country. The Anglo-Saxon invasion was the displacement of one race by another. The traditions of North Germany were transferred to the new settlement. The conquest of Gaul was the subjugation of a race that survived and mingled with the conquerors, in turn partly subduing them by their culture. In England, the village communal and allodial land-holding survived and competed with boc-land. In France all land was held on the sufferance of the conquerors.

The essential element of the feudal system was the reciprocal relation arising from the grant of land by a superior, known as the lord, to another, known as the vassal. The relation was not founded upon any rent or fixed sum paid for the land, but upon a personal connection between the lord and vassal, expressed by homage. This act was above all a promise of absolute fidelity; but it also included certain duties which closely resembled those owed by a citizen to the State. These were in general the following: The vassal was bound, when his assistance was required, to fight for his lord; he was bound to submit to the jurisdiction of his lord; and he was bound, when called upon to do so, to assist his lord with his counsel and advice. In addition to these duties, there were certain feudal dues which he was bound by local or feudal custom to render to his lord from time to time. The lord in turn placed himself under obligation to defend the vassal, to render him justice, and to preserve strict faith toward him.

Such a relation might admit of any number of ramifica-

tions, and in fact it extended throughout society, from the highest to the lowest ranks. In every case, the foundation of the bond was the land which one had granted and another had received. The larger proprietors regranted their estates on terms closely resembling those on which they had received the land. In France, the complete subordination of all ranks to the monarch was achieved only after long struggles with the greater vassals, who were hardly less powerful than the king himself. In feudal England, the king was from the first lord paramount of every subject within the realm. The firm and shrewd policy of the Conqueror, and the conditions of the succeeding reigns, rendered this possible.

✓ The origin of the system may be traced to two practices, which were afterward united in one relation. These were the system of *beneficia*, which the barbarian invaders had adopted from the Romans, and the closely related *emphyteusis*, by which the inheritable right to occupy the land of another was established. The *beneficia* of the barbarians combined both Roman ideas, and the *beneficium* was treated as heritable property.<sup>1</sup> The second practice was commendation, by which an allodial proprietor voluntarily placed himself under some lord as a vassal. He surrendered his lands to such lord, and received them back in feudal tenure. Both sides were benefited by the transaction, and the feudal system was thereby greatly extended.

The importance of the Norman Conquest in the legal history of England is chiefly due to the general introduction of the feudal principles. The policy of the Conqueror, however, was not to disturb more than was absolutely necessary the conditions already existing in England. There was at first no general eviction. Those who had fought in the army of Harold were regarded as rebels against their rightful sovereign, and as such all their lands were forfeit to William, who appeared in the aspect of

<sup>1</sup> Cf. Waitz, *Deutsche Verfassungsgeschichte*, Kiel, 1865, IV, 693.

heir to the throne by virtue of his relation to Edward the Confessor. These forfeited lands were distributed among the Normans, each recipient stepping into the place of some English proprietor, with the same rights and duties. But those who had not taken sides with Harold were re-granted their lands upon payment of a fine; and although this redemption was not analogous to commendation, it was easy for later lawyers to regard it as such.<sup>1</sup> The extension of the system as a consistent whole was due to the repeated confiscations following the rebellions against the authority of William. The course of the succeeding reigns made the whole kingdom uniform in its land system.

Of almost equal importance, though less strikingly affecting the constitution, was the change introduced in the courts by the effects of the land system. Every acre of ground being held from a superior, and judicial authority being involved in the conception of lordship, there would necessarily exist a more or less uniform judicial system, which would in time entirely supplant the local courts of popular origin.

The Normans introduced no new body of law; they had no written law. But they introduced a system which was capable of development into a more or less well-concatenated legal code. Their leading men possessed an eminently legal spirit. Lanfranc, the first Norman Archbishop of Canterbury and William's chief adviser, had achieved reputation at Pavia and in France as a teacher of law. He was the first man versed in the scientific method of treating law who became prominent in England. He was as well versed in Anglo-Saxon law as the Saxons themselves. Formerly, the knowledge of law had not consisted in the grasp of legal principles, but in acquaintance with the various dooms of the Saxon and Danish kings. Henceforward the true conception of the study of law was to obtain.

<sup>1</sup> Cf. Stubbs, *op. cit.*, I, 258.



Among the changes introduced in the administration of justice was the separation of the ecclesiastical and secular jurisdictions. The bishops were no longer to sit with the ealdormen in the hundred court; they were to hold their own ecclesiastical courts, and to be governed by the canons of the Church. This was an important departure from the former ecclesiastical law system of England. After the foundation of Christianity among the Saxons, and when the first enthusiasm had in a measure abated, the English Church had become comparatively isolated and out of touch with the ecclesiastical movements of Western Europe. Kings, like Canute, might make pilgrimages to Rome; Edward the Confessor might favor Roman ecclesiastics; but it was not until the time of the Conquest that the Roman Canon Law, as distinct from local laws and canons, began to be generally received.

Another change was the introduction of trial by ordeal of battle, which seems to have been unused among the Anglo-Saxons. The innovation was strenuously resisted by the Englishmen of the towns, but was received without much opposition by the majority of the nation. The whole form of this procedure was in keeping with the thought of the time, and differed so slightly from other methods as to thoroughly pass into the legal system. It was the right of Normans, but might be employed by Englishmen, and soon it was accepted by those who at first had resisted it.

The Normans who came over with William were granted especial privileges before the law. Their position was in many respects dangerous. The land held by each had in all cases been formerly the property of an Englishman; and the natural enmity of the people among whom the conquerors had settled, and many of whom they had dispossessed, rendered their existence a perilous one. William made it the interest of each hundred to protect the Normans, by requiring the hundred to pay a fine for the

murder of each. He increased the fine for homicide, and extended the rule to cover every death by violence, regarding every slain man as a Norman until his English nationality was proved.

There were reasons other than the dangerous position of the Normans to cause William to favor his companions. The immemorial custom of granting superior privileges to the conquerors, and pride of race, which preferred to retain its own laws, even if inferior to those found existing — these combined to produce the same legal conditions in England after the Conquest as in Gaul after the barbarian invasions. The personal character of the law was indeed recognized for some time after the Conquest; and in those particulars in which the Norman law differed from that of the English, the invaders retained their own system. But a consistent system of personal law was impossible at the time of the Conquest. Even in France, where that legal conception had once found its most striking exemplification, the territorial conception had nearly supplanted the earlier idea. The position claimed by William in England was that of lawful successor to Edward; but the privileges accorded the Normans were inconsistent with his claim. In constantly recurring to the law of the Confessor as the fundamental law of the kingdom, however, the national character of William's rule was emphasized. This found expression and extension in the reigns of the succeeding kings, until the peculiar relation of the English rulers to their Norman subjects completely disappeared.

The continuity, as well as the uniformity, of the law was preserved by its invariable recurrence to the laws of Edward the Confessor — by which is meant the whole body of law in force at the close of the Saxon period. It is generally acknowledged that Edward issued no code, and this was recognized by William of Malmesbury, who points out the customary character of the pseudo-

Edwardian code, *non quod statuerit, sed quod observavit*.<sup>1</sup> Nevertheless, the distinction between the two forms in which law might appear was by no means appreciated; the Confessor was regarded as the great lawgiver, and the succeeding kings agreed to enforce his law as that of the land. It is said that William appointed a commission to make a recension of the ancient laws, so that they might be the basis of judicial procedure.

The continuation of the old forms of courts, at first changed only by the substitution in the judicial system of the Norman feudal nobility for the Anglo-Saxon nobility, was also a connecting link between the two systems, and tended toward the continuity and uniformity of the law throughout the country. This continuity and uniformity of the law was especially true of the law of personal property, that being less affected by the Conquest. It remained purely Saxon. The law of real property, on the other hand, became nearly everywhere Norman, or feudal, because of the new form of land tenure. The only important exception was in Kent, where the Anglo-Saxon proprietors remained in the majority and the customary law was retained. In this section, the law of primogeniture—a necessity in any feudal system—was unable to displace the custom of equal division of land among all the sons.

The system of courts which was continued was not well adapted to the new order of things. The manorial courts finally superseded the village communal courts. By strict feudal theory, the great feudal lord was supposed to hold a court whose jurisdiction included all his manors and thus was to take the place of the shire-court. But, as a matter of fact, this higher jurisdiction was not completely attained. ("The judicial power of the great feudal lord . . . was only an aggregate of manorial jurisdictions, not different in quality from the

<sup>1</sup> *De Gestis Regum Anglorum*, II, 11.



jurisdiction of the manor.”<sup>1</sup> This was the inevitable consequence of the widely separated holdings of the superior nobility. The system became an instrument of oppression. The nobles grasped the opportunity for extortion. They drew all the important cases to their courts, that they might obtain large fees. They neglected the small matters so intimately connected with the vitality of the everyday life of the people. Therefore the substantial justice which in the Anglo-Saxon period was brought to the door of the humblest citizen passed away. The court system became the object of loud complaints.

Opposed to the decaying system of local courts was the ever contending royal jurisdiction, which by a multitude of methods contrived to bring cases into the royal courts. The injustice and oppression so frequently perpetrated in the local courts were fruitful sources of removal of cases to the royal tribunals. The king took it upon himself to control the local courts by threats of intervention; writs of right and writs of false judgment brought the appeal directly to the royal courts. According to feudal procedure, the natural course of appeal would have been to the court of the immediate feudal lord. By the Statute of Marlborough this method of appeal was abolished. No one was to hear in his own court any plea of false judgment rendered in the court of his inferiors, “because all such pleas belong especially to the crown and dignity of our lord the king.”

The marked advance in the law administered in the royal courts tended to the further decay of the local tribunals and the predominance of their rivals. The local, or manorial, courts were governed by the rude customary law which had been retained by the people, and the refinements of procedure introduced into the royal courts were unknown in the popular tribunals.

<sup>1</sup> Gneist, *The History of the English Constitution*, London, 1891, p. 142.

The Norman lawyers introduced a system of formal pleading, and the Crown favored this practice. The importance of the compurgators steadily declined, and ordeal by battle was regarded as sufficient basis for decision. The lawyers of the royal courts were disposed to look with constant suspicion upon the methods of the local courts, regarding them as highly irregular. The authority of the king as the fountain of all justice was constantly emphasized by interference with the customary courts. The great lordships which reverted to the Crown by forfeiture or escheat were re-granted with less extensive judicial powers; subinfeudation was forbidden; the courts baron were not held where there were not at least two freeholders to compose the court; and the jurisdiction of the local courts was transferred to royal control.

In this manner was accomplished the transition from the Saxon through the Norman to the Angevin period of the judicial system of England. The feudal system was readily applied to the Saxon conditions, which indeed had been tending toward feudalization. The king was securely established at the head of the judicial system; the intermediate links in the chain were then quietly removed, and the monarch was brought into immediate contact with each of his subjects. The oath of fealty which William had required his new subjects to take at Salisbury in 1086 was in itself innovative,<sup>1</sup> for it bound the vassal not only to his immediate lord, but to the king as well; whereas in the feudality of Europe the vassal was bound only to the lord. Under the English system, in case of disputed jurisdiction, it was not difficult to prophesy which power would succeed. The feudal system remained the foundation of the land law of England; but it failed to become the basis of the judicial system, and its failure greatly modified the future development of English law.

The growth of scientific jurisprudence — which growth

<sup>1</sup> Cf. Stubbs, *op. cit.*, I, 266.

especially took place in the royal courts — was greatly stimulated by the renewed interest in the Roman Law and the new Canon Law, which latter, following the lead of the Civil Law, was rapidly assuming a scientific form. These two systems were not accepted by the royal courts as authoritative. They were regarded with great respect, and many valuable suggestions were obtained from them ; but they were never acknowledged as of binding force. Lawyers, when the law of the land failed them, were prone to turn to the Civil Law, though the introduction of its principles was carefully veiled. As for the Canon Law, this received much less attention from the royal courts, because the subjects of which it treated were for the most part relegated to the ecclesiastical courts. The growth of the royal jurisdiction was slow, as it was really a revolution in the constitution of the realm, and the ecclesiastical courts — which did not derive their authority from the king, but from the spiritual lord paramount, the pope — were allowed to decide cases according to their own law. The only exception to the complete application of the Canon Law in the ecclesiastical courts — whereby is meant the general Canon Law of Western Europe — was in the case of prohibitions issuing from the civil courts, restraining the action of the spiritual tribunals. In this matter, however, there was no denial of the authority of the Canon Law ; but there was a denial of the ecclesiastical jurisdiction. Although there were thus certain limitations to their application, the Civil and Canon Laws were nevertheless of immense importance in the history of English jurisprudence.

The leading lawyers, who were often ecclesiastics, were versed in both systems. Theobald of Canterbury, within a century after the Conquest, brought from Italy the great lawyer, Vacarius ; and soon after the advent of that jurist we find him teaching the Roman Law. Other Italians taught in England, and large numbers of English-



men studied in Bologna. Thomas, the martyr Archbishop of Canterbury, had studied law in Italy, as was the custom of many of the great men of the Church. No extensive study of the Canon Law took place in England; this was because of the nature of that law. The more important cases were sent to Rome for trial. They were conducted by Italian canonists, and the English canonists had to content themselves with minor matters.

### SECTION III. — LEGAL PROGRESS UNDER HENRY II

The first great period in the modernizing of English law is that of Henry II (1154-89). It is the period in which the jury system assumed a form something like that of the present, and in which it became a definite and permanent part of the law of the land. It is the period in which the permanent court of professional judges was established and itinerant judges were appointed, and in which "original writ" became a part of the administration of the law. It was the period in which the assize of novel disseisin, the assize of mort d'ancestor, the assize of darrein presentment, and the assize *utrum* were introduced and made permanent parts of the law. In short, the whole structure of subsequent English jurisprudence, as distinguished from the common Germanic inheritance, began in this reign to assume a definite form.

The reforms of Henry II were not introduced by statutes. No new rights were directly created. The changes in the law, which were most radical, were effected in much the same manner as those in the Roman law by the prætorian edict. The king approached the law from the point of view of its administration. New forms of action were granted; new methods of enforcing a claim made that claim a more valuable right. This was altogether in keeping with the spirit of early legal reform.

The first of the great reforms of Henry II was the

general employment of the jury in trials. The origin of this institution has been traced to almost every possible source. Its antecedents have apparently been found in the most unlikely places. It had, in fact, a close connection with many primitive institutions, and in the Anglo-Saxon law there were forms which indicated a conception of the jury, though only in some of its most primitive elements. The elements of this important system, however, certainly existed among the Franks of the empire of Charlemagne. From this beginning there is a clear line of development. The system arose in connection with the *missi* whom Charlemagne sent throughout the empire. It was their duty to make an *inquisitio*, or inquiry, into the conduct of the royal officers and into cases of crimes. In this way, the king oversaw the exercise of his rights in all parts of his dominion. The *missi* summoned before them the inhabitants and ascertained the facts from them. It was the king's prerogative in this way to ascertain his rights in any particular case, and he employed this method quite apart from the conduct of the ordinary courts of justice. It is noteworthy that the witnesses summoned had two duties: they were to declare cases of suspected crime, and they were to state the truth as to royal rights. Herein are contained the two functions of the early jury, before the conception became differentiated into the jury which accused and the jury which decided the facts of the case. In the Frankish custom is also found the origin of the idea of the grand jury as a body which presents for trial for offences brought to their knowledge. The method of ascertaining the exact extent of rights by inquest was granted as a favor to churches and bishops.

The Frankish inquest appears to a slight extent in Germany. After the settlement of the Normans in Neustria, it is found adopted by the newcomers. It was employed

for some time in France, but was superseded by the procedure introduced by the Canon Law, based on the Roman procedure. The Normans introduced it into England. The extent to which the kingly power was carried by William was formerly unknown in England; and, in addition to the ordinary courts, which were continued, the inquest was a powerful aid in ascertaining and defining the royal rights. The first great instance of this employment of the rudimentary jury was the compilation of Domesday Book. Furthermore, in any particular case the king might direct the inquest to be held. Thus, what might be called one of the earliest trials by jury in England was that in which the Archbishop of Canterbury, Lanfranc, the Count Mortain, and the Bishop of Coutances were directed to summon to one place the moots of several different shires, in order to hear the contention between the Abbot of Ely and several other persons. The possession of the land in question was to be determined by certain English who knew what lands were held by the Abbot of Ely on the day of Edward the Confessor's death. They were to declare upon oath their knowledge of the matter. The justices were to adjudge the lands according to the verdict thus rendered, except in the case of land held by grant from William.<sup>1</sup>

One reason for the extension of the system of jury trial was the Norman trial by battle, which, although a favorite method with the powerful and warlike leaders, was to the last degree oppressive to the poor and weak. The question of fact, which in the last resort might be determined by battle, might also be settled by recognitions, the early form of jury trial. This boon to the poor man was first introduced by Henry II in Normandy, before he became king of England, and it was made general in England soon after his accession to the throne.

In the earliest form of the jury, the jurymen were the

<sup>1</sup> Bigelow, *Placita Anglo-Normanica*, p. 24.



equivalent of what were later regarded as witnesses, and were selected from the neighbors and those most likely to be acquainted with the facts of the case. They were chosen by the court and not, as were the compurgators, selected by the parties to the suit, and they were supposed to be impartial. The next step in the progress of the institution was taken when witnesses were summoned to give evidence before the jury, not merely to act as compurgators. This was done especially in cases where the original witnesses were not among the number of those who were summoned by the court as jurymen. The date at which the jury ceased to be witnesses and became judges of fact cannot be ascertained with exactness. It is, however, certain that the separation of the two duties took place during the first century following the reign of Henry II; for by the time of Edward III the jury had ceased to act as witnesses. At first, the mere question of the number who were to render the verdict was of secondary consideration; but by the Constitutions of Clarendon it was provided that the jury should consist of twelve men of the vicinity.

In immediate connection with the system of jury trial was the appointment of itinerant justices, made by the Assize of Clarendon two years later. According to the first Article, the juries were to present notorious offenders. The kings had hitherto attempted to administer justice in person, and the royal courts were attached to the person of the monarch. Itinerant justices had been appointed by Henry I,<sup>1</sup> but during the reign of Stephen the system had fallen into disuse. The cause of its revival was the oppressions and extortions of the sheriffs, who, although they were the king's appointed *missi*, had begun to treat their office as hereditary. As in the earlier times, they went on the fiscal circuits of the king, and sometimes exercised functions which were purely

<sup>1</sup> Cf. Great Pipe Roll of 31 Henry I.

judicial. The king was defrauded, and much complaint was made concerning the abuse of the shrieval office.<sup>1</sup> "The remedy was natural. The king sent out the trusted men of his own immediate court, and others in whom he had confidence, to hold the provincial Eyres; and from being at first chiefly fiscal visitations, it was found desirable to give the iters wider scope, and to allow the people of the counties the benefits of the peculiar procedure and more ample protection of the king's courts. The result was, that before the end of the reign of Henry II the chief feature of the iter was the hearing of common pleas and judicial causes generally; and this result was encouraged in the most decisive way, to the extent of making direct inroads upon the jurisdiction of the courts of franchise."<sup>2</sup> By the Assize of Northampton in 1176, the provisions of the Assize of Clarendon were repeated in more stringent form, and the judges were divided into six groups having different circuits.

The appointment of royal judges to go on circuit is significant, in that it resulted in the concentration of all judicial authority in the hands of the king. The early Germanic constitution contained popular elements which were opposed to the development of any scientific system of jurisprudence. Only to the slightest degree was it susceptible to new movements in legal thought; in a more complex society, it was an anachronism. From a legal standpoint, even the feudal system was only theoretically an improvement. The duty of doing suit and service in the lord's court did not foster legal science; and an ascending series of feudal courts, terminating in the king himself, was found impracticable. In order that the king should be really king, and that justice should keep pace with the growth of the land, there was requisite an immediate derivation of all judicial authority from

<sup>1</sup> Cf. Stubbs, *Select Charters*, p. 140, for the Inquest of Sheriffs.

<sup>2</sup> Bigelow, *History of Procedure*, London, 1880, p. 95.

the king. Only through a centralized system of justice, in touch with every part of the kingdom and containing the popular element of jury trial, was possible the great legal improvement which was introduced by writs.

The application of the new principles of the king's immediate relation to the courts and of the employment of juries took place at the same time. The first application was the form of procedure known as the *assisa utrum*. By this, the question whether any land was "lay fee or alms" — that is, whether it was a matter belonging to the royal or ecclesiastical court — was to be settled by a jury of twelve men before the king's justiciar.<sup>1</sup>

The next step was the *assisa novæ disseisinæ*, or assize of novel disseisin, which was at once an ordinance and a form of procedure. The date of this very important measure as a fixed part of the law of the land may be placed at the council held at Clarendon in 1166. The principle, however, dates back to the time of the Conqueror.<sup>2</sup> This assize was founded upon a writ directing that an inquiry be made as to how the seisin stood at a previous given time, and its essential principle was that the verdict was to be rendered by a jury of persons who belonged in the immediate vicinity. The nature of the evidence was expressed in the name of the form of procedure. Possession was to be given to the plaintiff if the jury decided that he had been illegally disseised. Distinction was thereby made between the right of possession and ownership. The possessor might not be disseised without due process of law, even if the owner appeared and claimed possession. The question of ownership was to be settled later. Protection of possession went even

<sup>1</sup> *Recognitione duodecim legalium hominum, per capitalis Justitiæ regis considerationem terminabitur, utrum tenementum sit pertinens ad eleemosinam sive ad laicum feudum, coram ipso Justitia regis.* Const. Clarendon, 9.

<sup>2</sup> Cf. the case of the Abbot of Ely, p. 467.



further in the *assisa magna*, whereby the determination of a question as to lawful possession could be decided only by a jury, and no man might be required to answer for his tenement except upon a royal writ.

The *assisa de morte antecessoris*, or assize of mort d'ancestor, was in principle directed to the same end, and reached it by much the same means. The heir was protected in the possession of a tenement if the father had not been merely a tenant for life. The king again took the matter in dispute out of the feudal court, to which it would naturally have belonged, and the question was decided by a jury of neighbors.

The fourth of these assizes was *de ultima presentatione*, or darrein presentment. By the Constitutions of Clarendon all disputes as to advowson had been claimed for the king's courts. The former method of trying any such question had been by judicial combat. According to the new assize, an inquest was to be made as to who last presented to the vacancy. This being settled, such presenter should again present, but without any prejudice to the rights, as afterward determined, of either party. The reason for this haste in presenting to the benefice was the provision of the Canon Law that unless presentation was made within four months, in the case of the lay patron, and six months, in case of the clerical patron, the presentation lapsed to the bishop. By this assize the presentation was retained in the hands of those to whom the advowson probably belonged.

The form of trial arising from these four assizes, known as petty assizes, differs from the jury trial as the latter appears in the later centuries; but the essential principle is found in this early form. The best distinction between the jury and the assize is that the assize calls for the inquest in the original writ by which the plaintiff has obtained the right of being tried in the king's court, and according to the new law, in one of the four ways mentioned; but the

jury is in theory summoned only by the consent of the parties to the trial, to have the fact in dispute decided by an appeal to "the country." The jury did not depend upon the four petty assizes, but could always be introduced ; and its merits were early seen and its use generally adopted.

The assizes were directly connected with the king's prerogative of administering justice. By means of them, suits were brought into the royal courts. In the same manner, suitors might appeal for justice to the king in other forms than those provided by the petty assizes. A writ would be issued, citing the parties to appear and to try the case, according to a prescribed formula, in the king's courts, or directing the sheriff to see that full justice was done in the case. These writs were at first issued merely at the king's pleasure, and were obtained only by payment of fees proportionate to the worth of the subject-matter in dispute. They soon became a profitable source of revenue, and the system was encouraged by the sovereign. The increase in the amount of business of the royal courts brought about a less arbitrary method of issuing such writs. This was intrusted to officials, who issued *brevia de cursu*, writs of the same nature as those hitherto issued by the king. The next step in the development of this system of original writs was the invention of forms to cover cases which had not previously arisen, and to fix the fee to be exacted for the issuance of a writ.

These writs were for a time issued very freely by the king, through the clerks in the chancery. In the succeeding reigns the extension of the writs to every new subject-matter was felt to be an arbitrary measure of the king and his officials. The legislative power therein exercised was felt to be burdensome and unjust. The result was a restriction of the clerks of the chancery to the issuance of writs for matters and according to forms expressly provided for in the law. As a matter of fact, the writs had directly operated to interfere with many high-handed

acts of local magnates, and had extended the power and authority of the royal courts. By the Provisions of Oxford, in 1258, the chancellor was forbidden to frame or issue any new writs without the consent of the king and his council. Only a certain number of writs were to be purchasable. Each writ applied to a particular state of circumstances and led to a particular judgment. They were writs *de cursu*, and their number was added to by direction of the king and his council, or Parliament.

But the limitation of the issuance of writs to merely the cases for which there was a precise precedent was too stringent legislation. The methods of judicial procedure followed precise forms and formularies, whose excessive rigidity could not be maintained. The constant recurrence to legal fiction, which was rendered necessary in order to obtain justice, was irksome; and in 1285, but a few years after the limitation of the writs to a few cases, the clerks were directed to frame writs *in consimili casu*. No entirely new departure might be made, yet considerable latitude was permitted, and the administration of justice by the officials of the king rapidly grew stronger.

The system of royal writs, whereby the judicial system of the land was concentrated in the hands of the king, was substantiated by the royal courts, which were held at the court of the king. The business which came to these tribunals was the affairs not only of the great men of the kingdom, but of men generally throughout the land. The large amount of business constantly calling for adjudication rendered it impossible for the king to hear all cases in person. A number of judges were therefore appointed, who were attached to the court of the king. They were to hear and decide the ordinary cases that were brought before them. The more difficult cases, however, they were to reserve for the consideration of the king himself. These judges constituted the *curia regis*, the basis of the modern centralized system. As



yet the system was very informal in its constitution. It had not yet become separated into the different courts of the kingdom. It was simply a body of judges, who sat for the greater part of the time at Westminster. But that body could generally decide cases as definitively as the king himself. The writs which were issued in the time of Henry II clearly refer to this power. Thus, the plaintiff and defendant were summoned to appear "before the king or before his justices." The king's frequent absences in his foreign domains rendered necessary some substitute for his person; yet in some cases the writs could be obtained only from the king himself.

Inferior to this central court, or the *capitalis curia regis*, were the subordinate courts which held their sessions throughout the land. They also were royal courts, *curiæ regis*, and were capable of applying the new law of the land. This system brought the new forms of justice into all the counties. These courts were incomparably better than the local tribunals, and finally supplanted them. They remained under the supervision of the central court, and the judges who sat in them were responsible to the *capitalis curia regis* for their administration of justice.

Closely connected with the subject of the *curia regis* is a work devoted to its procedure. This, the treatise ascribed to Glanvill, may be called the first text-book of English law. The reputed author of this work was for a long time engaged in the judicial service of the king. In 1163 he was sheriff of Yorkshire, and in 1174, while sheriff of Lancashire and custodian of the Honor of Richmond, he had the good fortune to render the king a signal service, when he met, defeated, and captured no less a personage than the king of Scotland. His rise was rapid, and in 1180 he became chief justiciar, the highest office in the kingdom. He died in 1190 at Acre, Palestine, whither he had gone with King Richard.

Glanvill's important position in the history of English law is in great measure due to the *Tractatus de Legibus et Consuetudinibus Angliæ*, the authorship of which has been attributed to him. While the ascription of this work to Glanvill dates from a period very near his lifetime, yet the reference in Roger de Hovenden's Chronicle,<sup>1</sup> on which the authority of that ascription has in modern times been based, is ambiguous. It is certain that the treatise was composed while Glanvill was chief justiciar, that it was not completed in October, 1187, and that it was completed before Glanvill's death. Modern scholars are divided as to the authorship, some ascribing it to Hubert Walter, who was the kinsman and secretary of Glanvill, and who also became chief justiciar. But all agree that the treatise represents the state of the law as administered in the king's courts over which Glanvill presided, and that it was "not written without Glanvill's permission or without Henry's."<sup>2</sup>

The treatise describes the law from the standpoint of procedure. It is the best illustration of the rule that early law, as far as it is reduced to any system, appears as a description of actions to enforce claims. Its general scope is indicated in its opening words: "Of pleas some are civil, some are criminal. Again, of criminal pleas some pertain to the crown of our lord the king, others to the sheriffs of the counties. To the king's crown belong these: the crime which in the laws<sup>3</sup> is called *crimen læsæ majestatis*, — as by slaying the king or by sedition against his person or against his government or in his army, the concealment of treasure-trove, breach of his peace, homicide, arson, robbery, rape, forgery, and the like." The substance of the book may be described as an exposition of the various writs that were issued and of the procedure

<sup>1</sup> *Gesta Regis Henrici Secundi*, 215.

<sup>2</sup> Pollock and Maitland, *op. cit.*, I., p. 143.

<sup>3</sup> *i.e.* Roman Law.

upon them. Its value at the time in which it appeared was almost inestimable. Although the king's court had not yet been established with sufficient firmness, or for a sufficient length of time, to create case law, there was in this treatise such a record of the customs of the court as to insure uniformity of procedure and to greatly forward legal science. Numerous copies were at once made of the *Tractatus*, and during the fifty years following its composition it was revised to meet the changes in procedure caused by the new forms of action which were devised in connection with the new writs issued by the king.

The influence of the treatise extended to the kingdom of Scotland, and the *Regiam Majestatem*, which forms the beginning of the statutes of that kingdom, very closely followed Glanvill. Within forty years of its compilation the treatise, with a collection of formulas of the law, was sent by Henry III to Ireland. It became the foundation of legal science in that country.

The court-system established by Henry II was permanent. Richard I was in his kingdom only a short time during his reign, but the business of the royal courts went on without interruption. The judicial records of England begin in the sixth year of the reign of Richard I—1195—and from that date the record of English law is almost continuous. The precedents which have come to be the most important part of that law were thenceforth carefully recorded. As yet, the use of precedent in trials and the value of the records to legal science were not understood. It was reserved for the genius of Bracton to give to the law of his country its most distinguishing characteristic. At the accession of Richard I, the king's court had become a permanent institution, and in later reigns the limit of "legal memory" was set at September 3, 1189, the date of the inauguration of Richard's reign.

As the supreme judicial authority, the king's courts were fortunate in the circumstances connected with the rebel-



lion against John. That king was loth to abandon the evidence of ancient royal authority which was evidenced in the general administration of justice. The courts, which had in the Norman period followed the king about the realm, because connected with his person, had, during the reign of Richard I as well as that of his predecessor, Henry II, been held almost exclusively at Westminster. John attempted to restore the custom by which the court should follow the person of the king, though he permitted another court, under the presidency of the chief justiciar, to remain at Westminster. But this attempt to regain the ancient prerogative was foiled by the Great Charter wrested from the king by the barons, who in the exercise of their personal rights were restrained by the king's assumption of autocratic powers, and in the administration of justice were inconvenienced by the revival of the old methods. The substance of their demands, as granted in the Charter, was the reëstablishment and further development of the principles introduced by Henry I and established by Henry II. Many of the provisions of the Charter waited for centuries to attain their full significance; many were difficult of execution; but the Charter was a turning-point in the legal history of England. Its importance in the science of jurisprudence has been hardly less than in the Constitution of England.

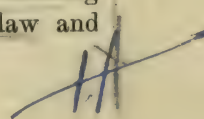
The principal provision of Magna Charta for the administration of justice was that the Court of Common Pleas should not follow the person of the king, but should remain at one fixed place in the kingdom, at Westminster, and that regular assizes should be held throughout the country by annual circuits in the various counties. Abuses connected with trials by wager of law and wager of battle were corrected, and the king's inferior officers were not permitted to hold pleas of the crown or to try any criminal charge, lest forfeitures might unjustly accrue to the royal exchequer. The king was to appoint

as justices only men learned in the law. He was not to deny, delay, or sell justice to any one. There was also a provision, — perhaps, because of its subsequent history, the most important of all, — that no freeman should be taken or imprisoned or disseized or outlawed or exiled or in any way destroyed, save by the lawful judgment of his peers or the law of the land. This provision, which has become the foundation of right of trial by jury and habeas corpus, was, however, in the days in which it first appeared, hardly understood in the modern sense. The jury system was not as yet sufficiently developed for such an important principle to be founded upon it. The principle was based upon a feudal right of trial by those of the same rank as the accused. The baron was to be tried by a court in which each man was a baron, the earl by a court composed of earls; and it is to-day generally admitted that the passage does not refer to trial by jury, even as that institution then existed. But the method of English judicial science is different from that of history. History is rarely content to accept the meaning of any statute without an exact exegesis of the original words of that statute and an interpretation based upon a careful study of the times of its promulgation. Judicial science is often content to view ancient statutes in the light of interpretations which have occasionally been founded upon a misunderstanding of the original meaning. The decision of the highest tribunals as to an historical fact of law, such as the existence of a given legal principle, have not been without error; though these decisions are historical in form only, their force, or effect, is to state the law for the present and future. In this way, the importance and meaning of certain phrases in Magna Charta have been settled because the legal institutions which have grown out of them have assumed a permanent place in English law.

The circumstances under which Magna Charta was established were favorable in other ways to the growth of

law. The king had placed himself in opposition to nearly the whole body of his English subjects. Even of those who, when he was obliged to meet the assembled barons, had remained on his side, many were at heart in sympathy with the popular movement. The king's subsequent course in devastating the country, the French invasion, the papal interference, and the failure of the king's mercenaries to support him, thoroughly discredited his position. The accession, while yet a boy, of Henry III, and the guardianship of the king by William Marshall, Earl of Pembroke, made permanent the authority of the Charter. The young king by confirming the Charter won over to his side the opponents of his father. After the death of Pembroke, the regency of Hubert de Burgh preserved the policy of the national party and supported the Charter.

It is with the Great Charter of 1215 that the distinction between written and unwritten law became certain and accepted. Before that date the enactments of national councils, however important they might be, were not preserved as statutes of the realm. They belonged to the *jus non scriptum*. But with preservation of court records — and of this we have a definite beginning in 1195 — came the modern conception of the *jus non scriptum*. Henceforward unwritten law was to be more and more identified with the law as it was declared in the decisions of courts, as distinguished from statutory enactment. Subsequently, though much later, came the distinction between law as established by decision and the unofficial utterances of the judge. With Magna Charta, as a permanent statute to which king as well as subject must conform, on the one side, and the court rolls, as records of precedents, on the other, began in English jurisprudence the predominating influence of its characteristic elements — case law and statute law.





## SECTION IV. — THE BEGINNING OF CASE LAW

The English law, unlike that of the Continental systems, is not the law of a code.\* Its history is not the story of the formation of a code, but is essentially an account of the accumulation of precedents. From time to time statutes modified the law, either by limiting traditional privileges or granting new rights; but its fundamental principles are apart from the statutes, and are due, not to the legislators, but to the judges.

It is evident, therefore, that there is in England no goal to which may be traced the history of the law, as is the case in most other countries. But a certain logical termination, which in some respects corresponds to the goal that has been set in the case of other nations, may be found as the completion of the history of early English law. The appearance of the first systematic and scientific study of jurisprudence, the compilation of a book which summed up the previous law and was to serve as authority for future ages, marked the beginning of the modern method. The author of this epoch-making work was Henry of Bracton, the first of the modern school of great English jurists.

The known facts as to the early life of Bracton are but scanty, and only in regard to his professional career is there much certainty. He was a Devonshire man, and the name by which he is known is variously written. He has been called Bracton, Bratton, Brattan, Bryckton, Britton, Briton, and Breton; but Henry of Bracton, or Bratton, seems to be the correct form. As was not infrequently the case in his time, he was at once a clergyman and lawyer. Certain well-authenticated dates in his legal career may give a clue to his duties in connection with the law courts. Thus, in 1245 he was a justice in eyre in the counties of Lincoln, Nottingham, and Derby. In 1248 he held the assizes in Cornwall,

Devon, Somerset, Dorset, and Wiltshire; and here we find him associated with Judge Henry of Bath, whom he afterward exposed for venality in office. In 1253, 1255, 1256, 1257, and 1259 his name appears in the records of the courts, and in the year last mentioned he became rector of Combe in Teignhead. In 1261 he became rector of Bideford, and in 1264 Archdeacon of Barnstable and Chancellor of Exeter Cathedral. His death occurred between 1265 and 1268.

In order to appreciate the importance of Bracton's position in the development of English law, it is necessary to compare the state of the national jurisprudence of the time of Bracton with that of the time of Glanvill. It is at once evident that a great change had taken place. As Güterbock points out in his work on Bracton,<sup>1</sup> the feudal system had been completed, the new forms of action — assizes — had taken the place of early methods, and the recognition of judicial decisions as authorities and productive sources of law had been established. By the revived interest in Roman Law a great impulse had been given to the study of law as a science, and a scholastic spirit which had animated lawyers from the time of Glanvill had led to the development of English law into an artistically organized, and often overrefined, system of jurisprudence.

In short, law had become a science altogether too intricate to be understood by those who had not made a special study of its elaborate provisions. A professional class of judges and lawyers had arisen. Judges were appointed because of professional learning more frequently than ever before. With the rise of the professional lawyer, the defects of the unwritten law were seen. Its uncertainties gave ignorant or venal judges every opportunity to practise wrong and extortion. There

<sup>1</sup> Cf. Güterbock, *Henricus de Bracton: Bracton and his Relation to the Roman Law*, trans. by Brinton Coxe, Phila., 1866.

was needed some work to put an end to this and also to furnish a guide to legal study. "A scientific commentary upon the law of the land," as established by precedent, was the need of the hour.

The fulfilment of this demand was to a great degree effected by Bracton. In the two works which he composed, he gave to legal literature, first, a systematic treatise on English law as it was in his time and as it had been determined by judicial authority; and, secondly, a collection of cases grouped in orderly and logical divisions. The former work, or the Treatise known as "*Henrici de Bracton de Legibus et Consuetudinibus Angliæ, Libri quinque, in varios tractatus distincti*," was begun between 1245 and 1250. In 1256 it was still in process of construction. The manuscript was revised in 1258, but after that date no work was done on it except in the way of glosses. The Note Book, containing the law cases, was compiled about 1258, and was finished in a comparatively short time.

Bracton's Treatise is incomplete. It breaks off in the middle of an exhaustive dissertation upon the writ of right, and there is no evidence that Bracton ever concluded his discussion of this subject. Succeeding legal writers — such as the authors of Fleta and Britton, both of whom drew largely from Bracton — carry the subject only as far as does Bracton, stopping short where he stops. If, therefore, a conclusion to the Treatise ever existed, it was unknown to the author's immediate successors. Probably the work was for some reason temporarily put aside in assuming new duties, and either the time or inclination to finish it failed.

The existing manuscripts of Bracton are comparatively numerous. Most of them seem to have been copied from the manuscript of 1275; but there is much divergence between the various manuscripts, and the earliest printed editions were poorly edited. The great dissimilarity in the texts is due to the many interpolations and glosses



made by students who have studied the Treatise, and to the scribes through whose hands the manuscript passed in copying. The contradictions between these interpolations, many of which were made all the more confusing because of misunderstanding of the meaning of the text, made the construction of an accurate text extremely desirable, and the absence of such was the main difficulty in all early researches into Bracton's works. To-day, however, there exists an excellent text of the Treatise, and Professor F. W. Maitland has edited a most satisfactory text of the Note Book.

The scope and purpose of the Treatise may best be described in the words of Bracton himself. He commences: "*Cum autem hujus modi leges et consuetudines per insipientes et minus doctos, . . . sæpius trahantur ad abusum, et quæ stant in dubiis, et opinionibus multotiens pervertuntur a majoribus, qui potius proprio arbitrio quam legum auctoritate casus decident . . . ad instructionem saltem minorum animum erexi ad vetera judicia justorum perscrutanda . . . facta ipsorum consilia et responsa . . . in unum summum redigendo.*" And "a clear and lucid picture of the law, of the fullest detail and all arranged in a logical and lucid system," was, as far as he wrote, the fulfilment of the quoted words.

The law of the land, or the Common Law, was the subject of his principal consideration; and this he treated broadly and philosophically. Procedure, in both civil and criminal cases; rules of substantive law; the feudal system; the law of both real and personal property; and much that belongs to other systems of jurisprudence, are all treated in this, the most important of the earlier legal classics devoted to English Common Law.

The Treatise is divided into five books. The first and second, respectively entitled *De Rerum Divisione* and *De Adquirendo Rerum Dominio*, are divided into chapters and paragraphs. The other books have no general titles; they

are divided into tracts, and these again into chapters and paragraphs. The third book contains the two tracts *De Actionibus* and *De Corona*. The fourth book contains seven tracts, the first five being named after the assizes of which they treat, — namely, *De Assisis Novæ Disseysinæ*; *De Assisis Ultimæ Presentationis*; *Assisia Mortis Antecessoris*; *Breve de Consanguinitate*; *De Assisa Utrum*;<sup>1</sup> the remaining two being respectively entitled *De Dote* and *De Ingressu*. The fifth book is divided into five tracts, namely, *De Breve de Recto*, *De Essoniis*, *De Defaltis*, *De Warrantia*, and *De Exceptionibus*.

Before further examining the Treatise, it may be well to refer to the Note Book, which has within a recent period been introduced to modern scholars. This important historic document, through the research of Professor Vinogradoff, was given to the world as the work of Bracton and was edited and published by Professor Maitland. The unique manuscript in the British Museum is imperfect. One sheet is missing from the beginning, and part of the conclusion is wanting, though precisely what part has disappeared cannot be determined. On the whole, however, the manuscript is in good condition.

The Note Book contains upward of two thousand excerpts from the judicial records of 1–24 Henry III. These transcripts of cases are in the handwriting peculiar to the thirteenth century; but from variations in the writing it appears that the work was produced by several scribes, probably four or five, working at the same time. “Every indication,” says the learned editor of the Note Book, “points to haste in construction; in writing one part of the work two clerks constantly relieved each other at short intervals.” This fact is important as indicating the probable date of the compilation. There seems to have been a well-arranged system of work. The headings were written, and the assignments made, by one

<sup>1</sup> See *ante*, pp. 469–471.

person. As the clerks completed their assignments, the various sheets of parchment of which the book is composed were given to the person in charge, by whom they were placed together. Despite the evident haste, the work was well done, as is evident upon comparing the manuscript with the rolls.

The ground for believing the date of the compilation of the Note Book to have been in 1258 is found in the Exchequer order of that year directing Bracton to return the rolls of the courts. Up to that time, Bracton had the rolls themselves in his hands, and had but little need of such a compilation as the Note Book. Its use would have been that of an index-digest rather than that of a compilation of authoritative cases. The marks of reference upon the rolls themselves show such index to have been unnecessary and hence probably non-existent. The order to return the rolls found Bracton unprepared with data from which to complete his Treatise independently of the rolls. It is probable that he immediately assembled such working force as was at hand, and proceeded as rapidly as possible with the work of transcribing from the rolls the cases which he needed. This work may well have been contemplated, or even begun, before the Exchequer order was received; be this as it may, when the rolls were returned Bracton had the data needed for completion of the Treatise.

The Note Book is the first collection of cases known in England. It was the work of a man who had in his mind a definite system of selection, and whose work was done with the specific object of furnishing data for the development of legal science. No one before Bracton had clearly conceived the value and binding authority of English judicial precedents in the determination of future cases; and for generations after his death no one took up the work and carried further the execution of his great plan. Indeed, the legal writers of authority whose works suc-



ceeded that of Bracton, and who used as their basis, if not their sole subject-matter, the theories and conclusions of his work, so completely failed to appreciate his valuation as to eliminate as unnecessary the cases he had cited.

In considering the Treatise *De Legibus et Consuetudinibus Angliæ*, it is necessary to recall the fact that before the thirteenth century English law was essentially *jus non scriptum consuetudinarium*. The written sources of law were few and untrustworthy. There was, however, a growing sentiment in favor of an organized system for the preservation of legal records, and the transactions of the various courts had begun to be carefully compiled and properly cared for. But Bracton was the first English jurist to express acknowledgment of the decisions of the courts as an authoritative expression of the law. To quote his own words: "*Si autem aliqua nova et inconsueta emergerint, et quæ prius usitata non fuerint in regno, si tamen similia evenerint, per simile, judicentur cum bona sit occasio a similibus procedere ad similia.*"

The Treatise is founded on English case law and English customary law. The terminology and presentation, however, show that the author owed much to the Roman jurists. He was familiar with the *Decretum* and the Decretals of the *Corpus Juris Canonici*, as well as with the Institutes, the Digest, the Code, and the Novels. He had also studied the works of the masters of jurisprudence, and had thus trained himself in logical methods of presentation. His work is therefore arranged upon a Roman plan, and, in spite of its English origin, contains many maxims and principles borrowed from the *Corpus Juris Civilis*.

The form of the first part of Bracton's Treatise is modelled upon the Institutes of Justinian, and law is arranged according to the well-known trichotomy, "*Quod omne jus pertinet vel ad personas, vel ad res, vel ad actiones.*" This Roman influence is to be noted throughout the work.

Bracton used the same Roman method found in the works of Azo and Placentinus, to whom he was much indebted. In all three there is the same division of the subject-matter and its arrangement into interrogatory headings. But this Roman influence is far more a matter of form than of substance. Bracton used the logical methods of Rome; but his law is the law of England. The authorities upon which he bases his conclusions may be divided into those English in origin, having been judicially stated or generally recognized as customary law, and those of foreign origin. But Bracton generally states no authority as conclusive, and puts forward no legal principle which had not obtained in England a recognized position as a part of national law. In spite of his debt to Roman Law, which may be exaggerated because of the Roman form adopted, Bracton cannot be accused of attempting to foist the Roman Law upon the English nation. The statement of Maine,<sup>1</sup> that "an English writer of the time of Henry III should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the *Corpus Juris*," is, to say the least, somewhat exaggerated. In many instances Bracton dissents strongly from both canonists and civilians. In the great controversy over the legitimation of bastards Bracton as strongly opposed both foreign systems as did any of the barons. "And indeed we find some difficulty in absolving him from falsifying history in order to secure a triumph for English law."<sup>2</sup>

The Treatise is chiefly based upon some 404 cases which were actually decided in English courts, and Bracton claims them as the source of the greater part of his work: "*Vetera judicia justorum, facta ipsorum, consilia et responsa.*"

<sup>1</sup> *Ancient Law*, p. 79.

<sup>2</sup> Pollock and Maitland, *op. cit.* I, pp. 187, 188.

He does not employ citations "where rules of law have been recognized by ancient customs, or where principles, through long acceptance, have become a recognized part of the law of the land." He uses them rather as the highest authority "in the solution of difficult and doubtful questions, or to establish the origin and existence of a principle of special character or recent date."

The citations used by Bracton can be grouped into four classes: those from the De Banco rolls (1217-34); those from the Coram Rege Rolls (1234-40); those from the Eyre Rolls; and a few from later and miscellaneous rolls. With few exceptions, all these citations are made from the rolls of but two judges, Martin Pateshull and William Raleigh. Professor Maitland, in his *Introduction to the Note Book*, suggests a very plausible explanation for this fact. He says, "Bracton had Pateshull's Rolls and Raleigh's Rolls in his possession. Segrave's he could not get; they were at Leicester or Kenilworth; all should by rights have been in the Treasury. Bracton could only use habitually such as had come to his hands by happy accident."

Bracton's relations to the Roman Law are indicated not only by form, but by the employment of much the same terminology, and by the free use of its maxims. Direct quotations are also not infrequent in the Treatise. There are extracts from the Digest as well as from the Code, although there are none from the Novels. In comparing the Institutes of Justinian with Bracton's work, it is found that Bracton, Bk. I, corresponds in form to the Institutes I, 1-4, 8, 9, 12; Bk. II, ch. 1-4, and Bk. III, trac. 1, follow in general the course of Institutes III, 13-15, 18, 19, 29, and IV, 6. On the whole, however, Bracton prefers to use the works of eminent glossators rather than the original texts. It is true that there are to be found excerpts from the *Corpus Juris*, reproduced in order and with only slight modifications. Thus, a



large part of D. 41, 2, 1, 2-15 appears on f. 43 Brac, and of Inst. 3, 13 on f. 99 Brac. And whole pages of Azo's *Summa* are literally copied in the Treatise; indeed, Bracton not infrequently refers his reader to the *Summa* for further information upon some particular topic: "*Ut in Institutis plenius inveniri poterit et in Summa Azonis.*"

It does not follow, however, that Bracton introduced new legal principles, even in his very free employment of foreign law-books. The position of the Roman Law in the intellectual world of his time rendered its reception nearly universal. It was the general opinion that the Roman Law was the Common Law of Christendom where it was not opposed to local laws. This opinion Bracton shared with the other learned judges. It was, therefore, the Roman Law that governed judges in many decisions where the English statutes or the local usage was uncertain or insufficient. The hypothesis of a special importation is not requisite to explain the presence of Roman Law in Bracton's work. As Güterbock points out, "Bracton copies Roman Law when it is English law, and only as such. The very errors of Bracton show Roman Law, as he puts it, errors and all, to have been English law."

The Treatise of Bracton was epoch-marking. It was for England the beginning of the modern science of law. It was clear, pointed, and timely; and it has exerted a greater and more lasting influence than has any other English legal work. It was the one great authoritative work adaptable to quotation, and a long line of works was based upon it. The most important of these legal classics are the work known as Fleta (*circa* 1289) and Thornton's Abridgement of Bracton (*circa* 1292). These works include all the matter of Bracton, save what is evidently regarded by their authors as surplusage. They omit the authorities cited by Bracton, thereby indicating the sufficiency of Bracton himself as adequate authority. The work known as Britton (*circa* 1297) written in Norman

French, is merely an abridgment of Bracton, and the name itself is probably only another form of that of the older author. The *Natura Brevium* of Chief Justice Sir Anthony Fitzherbert, published in 1514, marked a new stage in the extension of the influence of Bracton, for the author used not only the Treatise, but also the Note Book.<sup>1</sup> In 1569 the Treatise was edited by "T. N." and published by Richard Tottel, and a reprint of this edition appeared in 1640. In the meantime Sir Edward Coke published his *Institutes*; and the early law of this work is derived, through Fitzherbert, from both the Treatise and Note Book. Reeves, Blackstone, Spence, and the rest of the great army of writers upon legal topics, do not hesitate to express their obligations to Bracton. The judiciary joins with the text-book writers in this; and Chief Justice Parker voiced the opinion of the Bench when, in referring to Bracton, he said: "I do not say that the whole of the passage in Bracton is *now* good law; *it was all good law* at the time he wrote; and all of it that is adapted to the present state of things is good law now."<sup>2</sup>

With Bracton we may appropriately close our sketch of the growth of the law of England in its first great formative period. In doing so, we must not overrate the importance of the man and his work. They hold a most honored place in legal history, but less for what they accomplish than for what they represent.

The flux and reflux of legal currents centuries ago washed all the practical value from the *Legibus et Consuetudinibus Angliæ*. That which remains is valueless except as a monument. It marks the beginning of the great series of legal text-books which have been the glory of the jurisprudence of England; it indicates the first expression

<sup>1</sup> Cf. Maitland, *Introduction to the Note Book*, p. 117.

<sup>2</sup> Spence, *Equitable Jurisdiction of the Court of Chancery*, Lond., 1849, 121; Reeves, *History of English Law*, Phila., 1880, I, 511.

of the principle of *stare decisis*, which is the controlling element in English law ; it clearly presents the law of the period in which it was written ; but it has no present authority.

The Treatise was, however, for several centuries of incalculable value to the men of the law. It was the one authoritative work to which lesser treatises must conform. It was the presentation of English law as it then existed. The systematic arrangement and exposition of the law of England which Bracton first gave to the world was in accord with the spirit of his time — a spirit whose development is to be found in modern jurisprudence.





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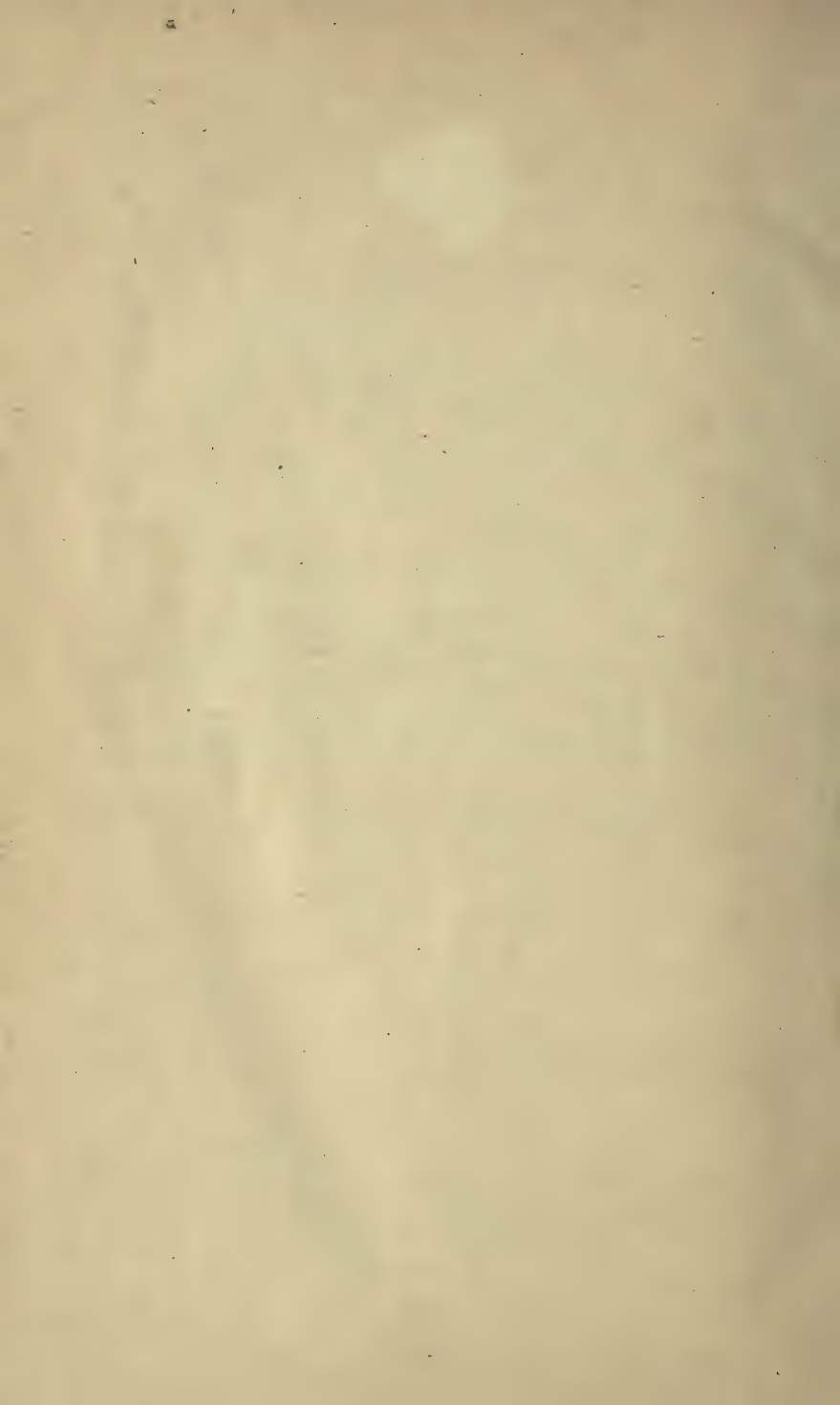
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